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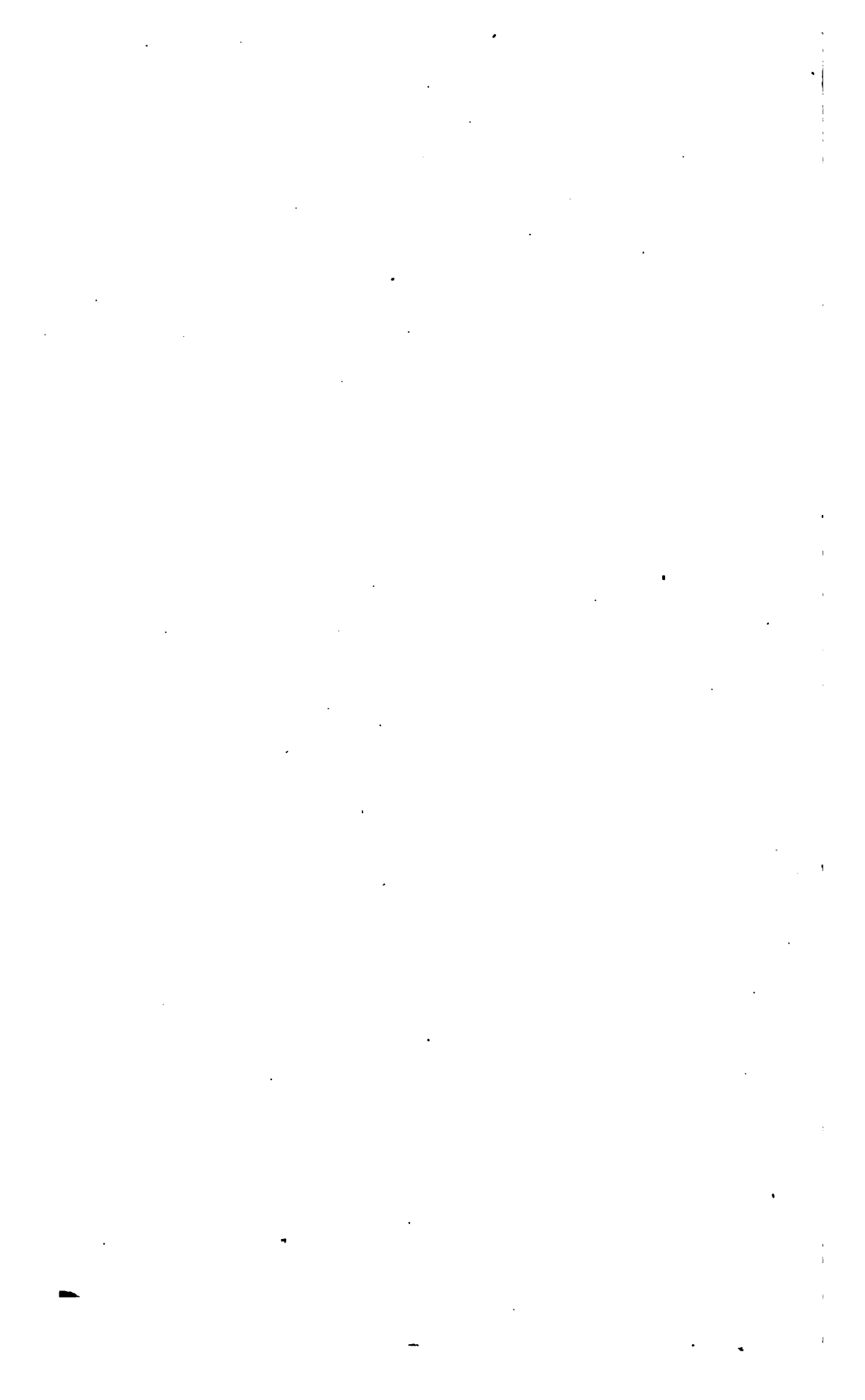








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A  
TREATISE  
ON THE  
LAW OF EVIDENCE.

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By S. MARCH PHILLIPPS, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

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VOLUME THE SECOND.

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*Fifth Edition,*

*WITH CONSIDERABLE ADDITIONS.*

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A

**TREATISE**

ON THE

**LAW OF EVIDENCE.**

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**BOOK THE SECOND.**

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**C**IVIL actions, when considered with reference to the nature of the injury suffered, or of the remedy sought, are commonly distributed into the three several kinds of real, personal, and mixed. Real actions, as they are seldom resorted to in the present day, are not included within the design of this treatise; and the only mixed action, which will be considered, is the action of ejectment. The other class, consisting of personal actions, is far the most numerous, and these are usually divided into such as are founded on contract, and others founded on tort or wrong, independently of any contract. Of the first kind, the actions here treated of, are actions of assumpsit, covenant, and debt. Of the latter kind, are actions on the case, replevin, and trespass. Only a few of this class of actions on the case have been selected for discussion; those selected are the actions for defamation, for malicious prosecution and malicious arrest, and the action of trover, which are some of the most frequent occurrence and in most general use. After these, actions founded on particular statutes are considered, of which the principal are the actions on the statute of Winton, and on the riot act. The actions

here enumerated, are treated of in the first part of the present volume.

Actions may also be considered with reference to the particular relation or character of the parties in the suit; and this relation, it is obvious, will often materially vary the evidence in the cause. Where a party stands in the situation of executor or administrator, additional proof will often be requisite, for the purpose of proving the party legally invested with the office. The same remark applies in a much stronger degree to actions against sheriffs, justices of the peace, or other public officers, and especially to actions brought by the assignees of a bankrupt. It is necessary, therefore, to consider what evidence may be requisite in such actions; and this forms the subject of the second part of the following treatise.

## PART THE FIRST.

### CHAPTER I.

#### *Of Evidence in Assumpsit on Promissory Notes and Bills of Exchange.*

**T**HE plaintiff, in an action of assumpsit on a promissory note or bill of exchange, will have to prove, under the general issue; first, that the note or bill is either in express terms, or in its legal effect, the same as described in the declaration; secondly, that he has an interest in the note or bill, as payee, indorsee, or in some other character; thirdly, that the defendant, as the pleadings allege, has become a party to the note or bill; fourthly, that the defendant has not performed his contract.

Variance.

With respect to the first point, namely, the conformity of the note or bill with the description in the declaration, the general rule is, that a material variance between the descrip-

tion of the written instrument in the pleadings, and the legal import of the instrument proved at the trial, will be a ground of nonsuit; and although that part of the declaration, which contains the misdescription, may be expressed under a *vide licet*, yet this will not cure the defect. (1)

The following are examples of material variances. In one case, the declaration represented a note as containing an absolute and unqualified promise to pay the money; whereas the note contained words, inserted in the body of the instrument, which made it payable at a particular place; here, a material part of the instrument was omitted. (2) In another case, where the plaintiff declared on a note given by three persons, describing them by name, and the name of one of the three upon the note differed from that stated in the declaration, the Court of King's Bench determined, that the contract set out in the pleadings was not supported by the evidence; and although two out of the three persons, who gave the note, were stated to be outlawed, and the action was brought against the third, yet this circumstance could not vary the general rule; the outlawry was only stated as an excuse on the record for not proceeding against the parties outlawed; but this would not remove the objection, that the evidence produced, in an action on a written instrument, had not identified the instrument as described in the pleadings. (3) \*

1. Variance in place of payment.

2. In name of party.

(1) *White v. Wilson*, 2 Bos. & Pul. N. P. C. 247. *Hodge v. Fillis*, 116. *Pope v. Foster*, 4 T. R. 590. 5 Campb. 463. *Grimwood v. Barrit*, 6 T. R. 460. (3) *Gordon v. Austin and others*, *Hutchinson v. Piper*, 4 Taunt. 810. 4 T. R. 611.\*  
(2) *Roche v. Campbell*, 5 Campb.

\* This variance, according to the report in the 8vo. edition, was in a *Christian* name alone; but, according to the folio edition, there was a variance in both names; the persons declared against being William Austin, Robert Strobell, and William Shertliff; whereas the names on the note were William Austin, Daniel Strobell, and William Skutliff.

If it had been proved in the case of *Gordon v. Austin and others*, that the real person was served with the process, though under a mistaken *Christian* name, the misnomer would not have been a sufficient objection. See *Dickinson v. Bowes and others*, 16 East, 110. In this case, one of the defendants was sued by the name of *Thomas Kay*; the notes, which were

3. In date.

Where a bill or note is described in the declaration as bearing date on a certain day, and the date on the instrument is different, this is a fatal variance (1); but if the declaration only allege, that the defendant on a certain day drew the bill, not stating the particular day as the date of the bill, a variance between the days will not be material (2); for in this case the day is not mentioned, as in the former instance, as part of the description of the instrument, but merely with reference to the act of drawing the bill. And if there is no particular date to the indorsement, and the declaration states that it was made *before* the note became due, it would not be a material variance to prove, that the indorsement was made *after* it became due. (3)

4. In consideration.

A bill drawn upon a person, to pay to the drawer's order a certain sum for *value received*, does not mean value received of some person in blank, to be afterwards ascertained as indorsee, but means value received by the *drawee*; if, therefore, the declaration describe it as received by the *drawer*, it is a material misdescription. (4) Or in an action against the acceptor, if the declaration describe a bill as directed to the

5. In direction of bill.

(1) Anonym. case, ruled by Lord Ellenborough, cited in 2 Campb. N. P. C. 159.  
 (2) Coxon v. Lyon, 2 Campb. N. P. C. 507. in note.  
 (3) Young v. Wright, 1 Campb. N. P. C. 308. in note.  
 (4) Highmore v. Primrose, 5 Maule & Selw. 66.

the subject of the action, were signed by J. Hodson, "for Bowes, J. Hodson, Key and Co.;" *Thomas Kay* was not the name of one of the partners, but the real name of the partner was *John Key*; this defendant suffered judgment by default, the other defendants pleaded the general issue. An objection was made at the trial, that there appeared to be a material variance, *Thomas Kay* (the party sued) not being a partner. The plaintiff, in answer to this objection, proved, that the person, whom he intended to sue and had actually served with process, though misnamed, was *John Key*, one of the partners with the other defendants, and that there had been a mistake in proceeding against him by the name of *Thomas Kay*. Mr. Baron Wood, who tried the cause, was of opinion, that this proof, of having sued the real partner and serving him with process, though under a mistaken Christian name, had removed the objection, and that the variance between *Key* and *Kay*, was immaterial; and though this point, as well as another, was reserved, yet it was not insisted upon afterwards by counsel, nor noticed by the Court. And see *Willis v. Barrett*, 2 Starkie, N. P. C. 29.

defendant, and the bill is made payable at a certain place named, but not made payable by a particular person, this also is a fatal variance, though the defendant, the acceptor, lives at that place. (1)

If the declaration state, that the bill was drawn by A. B., who indorsed it to the plaintiff, "his own hand being thereunto subscribed," and the indorsement was in fact made by an agent by procuration in his own name, this has been held to be a substantial variance (2): and the reason assigned is, that if the indorsement were stated according to the fact, the defendant might show, that no such procuration or authority had been given. But in an action on a bill similar to that mentioned in the last case, where it appeared that the drawer's name had been indorsed by his wife, Lord Ellenborough was of opinion, that it would be too narrow a construction of the words "his own hand being thereunto subscribed," to require that the name should be written by the party himself, and he was inclined to think, it would be sufficient to show, that the name had been written by an authorized agent. (3) And, in another case, where the declaration stated, that the defendants made their bill of exchange, "their own proper hands being thereunto subscribed," and the bill appeared to be drawn in the name of the defendant's firm, Lord Ellenborough entertained some doubt upon the point, but refused to nonsuit the plaintiff; especially, as the defendant could not have been led into any mistake with respect to this particular bill being the subject of the suit. (4)

6. In the person indorsing, or drawing.

The true principle is, as before mentioned, that the written instrument described in the declaration must correspond, *in*

7. In currency.

(1) *Gray v. Milner*, 2 Starkie, N. P. C. 556.

(2) *Levy v. Wilson*, 5 Esp. N. P. C. 180., by Lord Ellenborough. See 2 Campb. N. P. C. 306.

(3) *Helmaley v. Loader*, 2 Campb. N. P. C. 450. Proof of a promise

to pay, made with the knowledge of all the circumstances, puts an end to the objection.

(4) *Jones v. Mars and another*, 2 Campb. N. P. C. 305. The bill purported to be drawn by "Mars and Co."

*substance and legal operation*, with the instrument produced in evidence: they may correspond in words and letters, yet be essentially different. Where a bill was described in the pleadings as having been drawn at Dublin for a certain sum, but the declaration did not mention Ireland, nor specify Irish currency; there, as it appeared that the currency of Ireland differed in value from the currency of this country, the Court of King's Bench held, that there was a material variance between the declaration and the proof; for though the place and the sum corresponded to the very letter, yet as the sum specified in the bill must mean that particular sum in Irish currency, and the sum mentioned in the declaration is to be understood in English currency, these sums would differ in amount, and therefore the bill produced differed from the bill stated in the declaration. (1)

s. In time of presenting or indorsing.

A variance between the allegation and the proof, as to the time of presentment, or of making the indorsement, is not material. If a bill of exchange is payable at a certain time after sight, and the declaration allege a presentment, it will be sufficient to prove a presentment subsequent to that alleged: as, where a bill was drawn on the 11th of August, payable 50 days after sight, and the declaration alleged a presentment and acceptance on the day of the date, and a presentment when the bill became due and payable; but in fact the bill had been presented for acceptance, and accepted on the 19th of September, and presented for payment on the 11th of November: Lord Ellenborough held, that the proof was sufficient, as the bill had been presented for payment after the time when it became due, according to the terms of the bill and the date of presentment for acceptance. (2) So, with respect to a variance between the proof and the allegation, as to the time of making an indorsement, it is not material, that an indorsement is

(1) *Kearney v. King*, 2 Barn. & Holt, contra, in *Jackson v. Piggott*, Ald. 301.

(2) *Forman v. Jacob*, 1 Starkie, had been before doubted. See Bayley on Bills, p. 181.



stated to have been made before the bill became due, but proved to have been made afterwards. (1)

One other instance of variance, which occurred in the above-cited case of *Forman v. Jacob* (2), may here be mentioned. In that case, Lord Ellenborough held, that a variance between the real name of an indorser, (which was the name on the bill,) and the name alleged in the declaration, was immaterial: "whether the name on the bill be the party's false or true name is immaterial, if it be his name of trade; the only question is, as to the identity of the person."

9. In name of indorser.

It is not a material variance, under the general issue, that the bill of exchange is stated in the declaration, as having been drawn (3) or accepted (4) by the defendant, but proved to have been drawn or accepted by others jointly with him. Such an objection can only avail, when the fact is pleaded in abatement. — With these general observations on the subject of variances, we may now proceed to inquire more particularly into the evidence requisite to support the several actions on promissory notes and bills of exchange. And, first, of promissory notes.

Bill drawn by another besides defendant.

## SECT. I.

### *Of Evidence in Assumpsit on Promissory Notes.*

THE order, in which it is proposed to treat of this subject, is, First, to consider the action by the payee of a note against the maker, which is the simplest of all actions on notes; Secondly, that by an indorsee against the maker; Thirdly, the action by the holder of a note against the maker; Fourthly, and lastly, that by an indorsee against the indorser of a note.

(1) *Young v. Wright*, 1 Campb. N. P. C. 139.

(2) *Ante*, p. 6. (2)

(3) *Evans v. Lewis*, MS. case, cited in 1 Saund. 291. C. d. in note.

(4) *Mountstephen v. Brooke*, 1 Barn. & Ald. 224.

1. Action by  
payee against  
maker.

First, of the action by the payee of a note against the maker.

The declaration in its most general form avers, that the defendant on a certain day made his promissory note; then it proceeds to state the substance and legal effect of the note, and concludes with averring the legal obligation on the defendant to pay according to the tenor of the instrument.

Proof of  
defendant's  
signature.

The plaintiff, therefore, has in general only to prove the hand-writing of the person, whose name is upon the note, and that this person is the defendant. Some proof of the identity of the person is clearly necessary; and it would not be sufficient merely to prove, that a person calling himself by such a name signed the note. (1) If the note was made not by the defendant himself, but by another person in the defendant's name, or by a person as agent for the defendant, the hand-writing and authority of the agent must be proved; and this proof will support the general averment, of the note having been made by the defendant, which, according to the legal effect of the evidence, appears to be the fact. (2)

If the signing of the maker, or of his agent, is attested by a subscribing witness, (and when the note is for payment of less than five pounds) it ought to be so attested, otherwise it is void (3), that witness must be called to prove the signature; or, if his attendance can be properly dispensed with, his hand-writing must be proved. (4) Proof of the hand-writing of the attesting witness establishes the fact, that the instrument in question was signed by a person in a certain name; it is *prima facie* evidence of the instrument having been executed by the person whose name it bears; but it does not prove, that the defendant is that person. Some evidence of this kind is neces-

(1) *Memot v. Bates*, Bull. N. P. N. P. C. 604. *Helmley v. Loader*, 2 Campb. 450.

171. action on bond. *Middleton v. Sandford*, 4 Campb. 34., action on replevin bond. See vol. 1. part 2. ch. 8. s. 2.

(2) *Heys v. Heseltine*, 2 Campb.

(3) By stat. 17 G. 3. c. 30. s. 1.

(4) Upon these points, and others connected with them, see vol. 1. part 2. ch. 8. s. 2.

sary for the purpose of connecting the defendant with the note. (1) Proof of the defendant's signature on the note would be decisive; but such proof is not indispensably necessary; and much slighter evidence would, in the first instance, be sufficient. Proof that the defendant was present when the note was prepared, will connect him with the instrument. (2)

Payee v.  
maker.

An admission by the maker, that the hand-writing is his, will be sufficient evidence against him of his signature, in the case of an unattested note. Such an admission, though made in the course of a treaty for settling the cause, and under the faith of a compromise, is sufficient (3); for, although a statement by the party, as to the subject-matter or merits of the action, would not be admitted to his prejudice, if made under a compromise and for the purpose of buying peace (4), yet the rule is different with respect to the mere admission of his signature, which is a single fact, peculiarly within his own knowledge, and with respect to which he cannot be supposed to have made an unfounded concession; and this admission may be proved by an arbitrator, before whom it was made in the course of a reference. (5) An offer from the defendant to the plaintiff, after the note has become due, to give another note instead of it, is an admission of the plaintiff's title. (6) Payment of money into court, generally on the whole declaration, is also an admission of the defendant's signature. (7) If the defendant suffer judgment to go by default, it is an admission on the record, and conclusive against him; and no evidence need be given, in support of the note or bill, on the execution of a writ of inquiry. (8) The only use in producing the instrument in such a case, is for the purpose of seeing, whether it bears an indorsement of money having been paid. But the plaintiff is not bound to produce

Admission by  
defendant.

- (1) See cases in p. 8. (1)  
 (2) *Nelson v. Whittall*, 1 Barn. P. C. 115.  
 & Ald. 19.  
 (3) *Waldridge v. Kennison*, 1 Esp. N. P. C. 45.  
*N. P. C. 145.* Bayley on Bills, p. 223.  
 (4) See cases in (3). *Cumming v. French*, 2 Campb. N. P. C. 106. n.  
 (5) *Gregory v. Howard*, 5 Esp. N. P. C. 115.  
 (6) *Bonaquet v. Anderson*, 6 Esp. N. P. C. 45.  
 (7) See vol. 1. part 1. ch. 7. s. 3.  
 (8) *Bevis v. Lindfell*, 2 Str. 1149.  
*Green v. Hearne*, 3 T. R. 301.

Payee v.  
maker.

it; for if the defendant has paid any part of the money, he might have pleaded it, instead of suffering judgment to pass against him for the whole demand. (1)

An admission of the signature will be evidence against the party, who admits his hand-writing, but not against any other party. (2) In an action, therefore, against three persons, as makers of a note, where one of the defendants pleaded a judgment recovered, (consequently admitted his hand-writing by such plea,) and each of the other two defendants pleaded *non-assumpsit*, and on the trial the plaintiff proved only the signatures of these two parties, Lord Kenyon held that the hand-writing of the other was admitted on the record only as against himself, and as the declaration had averred that all the defendants had subscribed their hand-writing, the hand-writing of all must be proved. (3) What has been said respecting the effect of an admission, applies only to the case of unattested notes; if the note is attested, proof of the admission will not dispense with the evidence of the subscribing witness, when he can be produced. (4)

Demand of  
payment.

It will not be necessary, in this action, to prove a demand of payment on the part of the plaintiff, when the promise to pay is general (5); the action itself being a sufficient demand. But if the promissory note is made payable at a particular place, and the words restrictive of the place of payment are inserted in the body of the note, not merely in a memorandum at the foot, it will be necessary to prove, that the note was there presented for payment (6); for these words, so

(1) *Mills v. Lyne*, before Buller J., cited in *Bayley on Bills*, 227.

(2) *Bayley on Bills*, p. 223. See vol. 1. part 1. ch. 5. sect. 4.

(3) *Gray v. Hodson and Palmers*, 1 Esp. N. P. C. 135. *Bayley on Bills*, 224.

(4) See vol. 1. part 2. ch. 8. s. 2. As to the effect of an admission by the defendant's attorney, see vol. 1. p. 104. and as to an admission by his agent, p. 98.

(5) *Rumball v. Ball*, 10 Mod. 58. *Frampton v. Coulson*, 1 Wils. 53.

(6) *Saunderson v. Bowes*, 14 East, 500. *Dickinson v. Bowes*, 16 East, 110. *Wild v. Rennards*, cited in note in 1 Campb. 425, seems to show, that such a presentment is unnecessary; but in this case, as it has been since explained, (see 14 East, 501.) the place of payment appears to have been mentioned in a memorandum at the foot, and not in the body of the note.

incorporated in the instrument, constitute strictly a condition precedent, of which the plaintiff must aver and prove performance, in order to bring himself within the defendant's promise. The defendant having contracted to pay on demand at a particular place, and having no other engagement with the plaintiff than upon the note, is not liable except on a demand at that place. Proof of such presentment, therefore, will be requisite. But it will not be necessary also to show, that the maker had notice of its dishonour; as, where a note was made payable at a banker's house, and payment was refused, Lord Ellenborough held, that such notice to the maker was clearly unnecessary. (1) If the plaintiff has a legal excuse for not presenting at the place appointed, that excuse ought to be stated, and at the trial must be proved; but such proof is not admissible under a general allegation, that the note was presented, and payment refused. (2) If the note is made payable at two different places, the holder may present it at either place. (3)

Payee v.  
maker.

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The case, mentioned above, in which it is necessary to prove a presentment at the place appointed, is, where the place of payment is mentioned in the body of the instrument. But a distinction has been made, and another rule adopted, where the place is only mentioned at the foot, or at the back of the instrument: there it has been held, that such a presentment is not necessary (4); the memorandum not being considered as any part of the contract. In one of the last reported cases on this subject (5), Lord C. J. Gibbs said, "Where the direction to the place of payment is mentioned in the margin, or at the foot of the note," as it was in that

(1) *Pearse v. Pemberthy*, 5 Campb. N. P. C. 361. *Smith v. Thatcher*, 4 Barn. & Ald. 200.; action by Payee v. Acceptor. 5 Taunt. 398. 2 Campb. N. P. C. 551. S. C. *Price v. Mitchell*, 4 Campb. N. P. C. 201.

(2) See *Leeson v. Pigott*, cited in *Bayley on Bills*, 187., and *Bowes v. Howe*, 5 Taunt. 50.

(3) *Beeching v. Gower*, Holt, N. P. C. 313.

(4) *Saunderson v. Judge*, 2 H. Black. 510. *Callaghan v. Aylett*, 5 Taunt. 398. 2 Campb. N. P. C. 551. S. C. *Price v. Mitchell*, 4 Campb. N. P. C. 201.

(5) *Price v. Mitchell*, 4 Campb. N. P. C. 201., by Lord Ch. Just. Gibbs. *Richards v. Lord Milsington*, Holt, N. P. C. 364., by Lord Ch. Just. Gibbs. In the last case, the place of payment was written underneath in the margin.

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maker.

case, "the inspection and perusal of the instrument show, that this was not intended to be a condition to the absolute promise to pay contained in the body of the note." But a memorandum as to the place of payment, even at the bottom of the note, may have the effect of a stipulation, if it appear to have been part of the note, when the instrument was filled up by the maker; as where the whole of the note was printed, except the names of the parties, the sum, and the date; and the words at the bottom, designating the place of payment, were also printed; Lord Ellenborough held, that the memorandum was to be considered as a stipulation between the parties, being part of the note when the instrument was filled up, and consequently that proof of a special presentment was necessary. (1)

Proof, under  
common  
counts.

The common counts are inserted in the declaration, for the purpose of obviating some possible defect in the special count, or to prevent the fatal effect of a variance between the description of the instrument in the special count, and the real contents of the instrument. Thus, although the payee should, for some reason of this kind, fail on the special count, yet he may recover on the count for money lent, or on that for money paid by the plaintiff to the use of the defendant. The note itself, as between these original parties, is evidence of money lent, and is admissible, as a paper or writing, to prove the defendant's receipt of so much money from the plaintiff. (2) It was admissible in this point of view, before the statute of 3 & 4 Ann. c. 9., which enabled the plaintiff to declare upon the note; and that statute did not alter the rule, but supplied only an additional concurrent remedy.

If the note is produced, but cannot be admitted in evidence on account of a defect in the stamp, the plaintiff may proceed on the common counts, and prove the consideration for

(1) *Trecothick v. Edwin*, 1 Starkie, N.P.C. 468. See *Rowe v. Young*, 2 Brod. & Bing. 165. stated *infra*.

(2) *Bayley on Bills*, 165. *Story v. Atkins*, 2 Stra. 725. *Harris v. Huntback*, 1 Burr. 373.

which the note was given. (1) Thus, he may prove an admission by the defendant, as evidence of an account stated; and on such proof will be entitled to recover, provided his particular (if there has been any particular delivered under a Judge's order,) refer to that count, to which the evidence applies; for unless that is the case, he will be precluded by his particular. (2) Or if the note has been lost or destroyed, the plaintiff may resort to the common counts, and show the consideration and cause of the debt; but the loss or destruction of the instrument ought to be satisfactorily proved, as a security to the defendant that it is not in circulation, and that he may not be subjected twice to the same demand. (3)

*Payee v  
maker.*

One of the joint makers of a promissory note is a competent witness on the part of the plaintiff to prove the signature of the defendant, the other joint maker (4); for if the plaintiff should recover against the defendant, the witness would be liable to the defendant for contribution; if, on the other hand, the plaintiff fail, he may resort to the witness for the whole, and then the witness would be entitled to contribution from the defendant: so that, in either view of the case, the witness is indifferent in point of interest.

*Competency  
of witness.*

Secondly, of the action by the indorsee of a note against the maker.

*Action by in-  
dorsee against  
maker.*

A note, when it has been indorsed and transferred, is exactly similar to a bill of exchange. It is an order by the indorser upon the maker to pay the indorsee; which is the very definition of a bill. The indorser is the drawer; the maker of the note the acceptor; and the indorsee, the person to whom it is made payable; and all the authorities put such promissory notes on the same footing with bills of exchange. (5)

(1) *Wilson v. Kennedy*, 1 Esp. N. P. C. 245. *Farr v. Price*, 1 East, 55. *Brown v. Watts*, 1 Taunt. 353. (2) *Wade v. Beasley*, 4 Esp. N. P. C. 7. (3) *Dangerfield v. Willy*, 4 Esp. N. P. C. 159. (4) *York v. Blott*, 5 Maule & Selw. 71. (5) *Heylin v. Adamson*, 2 Burr. 669.

Indorsee v.  
maker.

1. Action by  
first indorsee.

The declaration, in an action by the first indorsee against the maker, after describing the effect of the note, proceeds to state, that the payee indorsed it to the plaintiff, and concludes with averring the legal obligation of the maker to pay according to the tenor of the note and of the indorsement. The plaintiff, therefore, will have to prove the hand-writing of the maker and of the indorser.

Proof of ma-  
ker's hand-  
writing.

The hand-writing of the maker is the sign of his liability: the indorsement to the plaintiff is the plaintiff's title. With respect to the proof of the maker's hand-writing, and the effect of his admission, the rules which have been before laid down, in treating of the action by the payee, equally apply to this action. (1)

Proof of in-  
dorsement.

The indorsement is to be proved in the ordinary mode, like other hand-writing; of which enough has been already said. An admission by the indorser, though sufficient evidence of the indorsement as against him, will not be evidence of that fact against the maker. (2) A promise to pay, or offer to renew, made by the maker to the indorsee after the note becomes due, is an admission of the holder's title, and will dispense with the proof of the indorsement to him, precisely in the same manner, as such a promise by an acceptor will dispense with that proof, in an action against him by an indorsee. (3)

If the plaintiff declare as indorsee upon a note made to the payee or bearer, the indorsement need not be mentioned; however, in a case, where the declaration stated, though unnecessarily, that the payee indorsed the note to the plaintiff, Lord Ellenborough held, that the indorsement ought to be proved. (4)

(1) See ante, p. 8.

(2) *Hemmings v. Robinson, Barnes*, 436. *Bayley on Bills*, p. 323. See ante, p. 10.

(3) See infra, action by indorsee v. acceptor.

(4) *Waynham v. Bend*, 1 Campb. N. P. C. 175.



When the promise to pay, contained in the note, is made to the payee or his order, immediately that the order is made to the indorsee by the indorsement, the promise attaches; notice, therefore, of the indorsement, to the maker, need not be proved, nor need it be stated; no qualification of notice was originally annexed to the promise, and none can be added.(1)

Indorsee v.  
maker.

Notice of in-  
dorsement.

A promissory note, when once indorsed and negotiated, becomes in effect a bill of exchange, and is evidence under the common counts, of money received by the maker for the use of the indorsee or *bonâ fide* holder.(2) The maker, in putting his name to the note, acknowledges that he has in his hands money of the payee, and undertakes to pay it to the person legally entitled to receive it, that is, to the person who has paid a good consideration for the note, and who has become the legal holder.(3) In other words, he makes an appropriation of so much money to be paid to the person, who shall become the holder of the note. However, it is to be observed, in a late case (4), Lord Ellenborough expressed an opinion, that the indorsee could not recover against the maker under any of the money counts, as he was not an original party to the note, and there was no evidence of any value received by the defendant from him; but the case was not determined upon this point, and the plaintiff recovered upon the special count.

Proof under  
common  
counts.

In an action by the indorsee against the maker, where the defence is, that the note has been given for an illegal consideration, letters from the payee to the maker are admissible to prove the illegality of the transaction, if they are shown to be contemporaneous with the making of the note; when the letters are once shown to be contemporaneous with the note;

Letter from  
payee as to  
the consider-  
ation.

(1) *Reynolds v. Davies*, 1 Bos. & Pull. 625.      gument in *Master v. Miller*, 4 T. R. 339.

(2) *Bayley on Bills*, 168.

(3) *Dimsdale v. Lanchester*, 4 Esp. 175.

301. And see Mr. Just. Buller's ar-

(4) *Waynham v. Bend*, 1 Campb.

Indorsee v.  
maker.

they are evidence of an act done by the payee, through whom the plaintiff claims. (1)

Competency  
of witness.

The indorser is clearly a competent witness for the defendant in this action, to prove payment of the money, for which he indorsed the note. (2) The payee and indorser, who has become a bankrupt and obtained his certificate subsequently to the date of the note, is not a competent witness for the defendant, to prove that the note was originally given without consideration; for he is no longer liable to the plaintiff, but will be liable to the defendant, in case he should be obliged by this action to pay the promissory note made for his accommodation. (3)

2. Action by  
second or  
other subse-  
quent in-  
dorsee.

The declaration in an action by a subsequent indorsee, is nearly the same as in the last case, containing only in addition a statement of the indorsements. The hand-writing of the maker, therefore, must be proved, and the indorsements as stated. (4) Where there are several indorsers between the payee and the last indorser, the plaintiff need not state the intermediate indorsements, but may declare on the indorsement by the payee to the last indorser, and by him to the plaintiff; consequently, the intermediate indorsements may be omitted in the proofs; but if they are stated, though unnecessarily, they must be proved. (5)

(1) *Kent v. Lowen*, 1 Campb. 177. 180. d. The defence in this case, was, that the original concoction of the note had been usurious. Now, by an enactment in a late statute (st. 58 G. 3. c. 95.) usury in the consideration will not affect a *bona fide* holder. And it has been lately determined, in the case of *Edwards v. Dick*, which was an action by the indorsee, against the drawer and indorser of a bill, that if the bill has been indorsed by the defendant to the plaintiff for a valuable consideration, it is not a good defence to show, that the bill was accepted for a gaming debt. 4 Barn. & Ald. 212.

It appeared from the post mark, in the above case of *Kent v. Lowen*, that the letters had been written just before the date of the note, and they were accordingly read. On a motion for a new trial, the Court held, that they had been properly admitted. And see *Langdon v. Hulls*, 5 Esp. 158.

(2) *Charrington v. Milner, Peake* N. P. C. 6.

(3) *Maundrell v. Kennett*, 1 Campb. N. P. C. 408. n.

(4) See ante, p. 14.

(5) *Chaters v. Bell*, 4 Esp. N. P. C. 210.

If a note is evidence, under the general count, of money had and received by the maker, for the use of the first indorsee, upon the same principle it must be evidence also of money received for the use of any subsequent indorsee. (1) There is as much privity between the last indorsee and the maker, as between the maker and the first indorsee. (2) Besides, a privity between the parties does not appear to be necessary, to support this action for money had and received (3): if A., for instance, deliver money to B., to be paid to C., C. may maintain an action against B. for the money, though no consideration should pass between them, and no promise be made by the one party to the other.

Indorsee v.  
maker.

Proof under  
common  
counts.

With respect to the competency of witnesses, it appears from what has been stated on this subject in another place (4), that the indorser of a note, who has received money from the maker to take it up, is not a competent witness, in an action by the indorsee against the maker, to prove, on the part of the defendant, that he had satisfied the note; for, if the plaintiff were to succeed, the witness would be liable to the defendant, not only for money had and received, but also for the costs of this action in consequence of his non-payment. The payee, who indorsed the note to the plaintiff, is a competent witness for the plaintiff, to prove that he indorsed it for a valuable consideration; he has an equal interest on each side: if the action fail, he would be liable to the plaintiff to the amount of the consideration; on the other hand, if it succeed, he would be liable to the defendant for money paid. (5) But a payee, who has become a bankrupt, and obtained his certificate, subsequently to the date of the note, is not a competent witness for the defendant, to prove the note

Competency  
of witness.

(1) See ante, p. 15. The reader will find the learning upon this subject collected in a judgment in vol. 1. of Cranch's Reports of Cases in the Supreme Court of the United States; Appendix, p. 418. 449.

(2) See *Eddie v. E.* Ind. Comp. 1 Black. 299.

(3) See *Israel v. Douglas*, 1 H. Bl. 242. 2 T. R. 543.

(4) Vol. 1. p. 61, 62. The contrary was determined in *Birt v. Kershaw*, 2 East, 458.

(5) *Shuttleworth v. Stephens*, 1 Campb. N. P. C. 407.

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maker.

an accommodation-note; for he would be liable to the defendant for the costs of this action, if the plaintiff should succeed. (1)

Action by  
holder against  
maker.

Thirdly, of the action by the holder against the maker.

The plaintiff, who sues on the note as bearer, will have to prove the hand-writing of the maker, and any indorsements that may be stated in the declaration. And in case the note has been lost or stolen from the owner, and afterwards negotiated, the holder ought to show, that he received it *bonâ fide* for a valuable consideration. (2)

Notice as to  
proof of con-  
sideration.

The rule, as to the necessity and effect of a previous notice, requiring proof of the consideration, appears to be this. If the title of the plaintiff, as holder, is brought into suspicion by a witness called on the part of the plaintiff, he ought to prove the consideration, although there has not been any notice to that effect (3); but, if no suspicion arises on the plaintiff's case, he will not be obliged, even after notice, to prove the consideration, until it has been impeached. (4) When the plaintiff has established a *primâ facie* case, it then remains for the defendant, if he can, to impeach his title; and until he has first cast some suspicion upon the title, by showing that the note was lost or obtained by force or fraud, he cannot, merely by giving notice to prove the consideration, cast the burthen of proof upon the plaintiff. But the defendant will be at liberty to produce evidence, for the purpose of im-

(1) *Maundrell v. Kennett*, 1 Campb. 408. n. See also *Jones v. Brooke*, 4 Taunt. 464., stated *infra*; and *Harman v. Lasbrey*, Holt N. P. C. 330., stated in vol. 1

(2) *Grant v. Vaughan*, 3 Burr. 1516. *Peacock v. Rhodes*, 2 Doug. 632.

(3) *Rees v. Marquis of Headfort*, 3 Campb. N. P. C. 574.

(4) *Reynolds v. Chettle*, 2 Campb. 596. *Paterson v. Hardacre*, 4 Taunt. 114 In the case of *Delauncy v.*

*Mitchell*, 1 Starkie, N. P. C. 439., Lord Ellenborough is reported to have held, that it is not competent to the plaintiff, to whom such notice has been delivered, to give evidence of the consideration, after having closed his case, in reply to the case of the defendant. But the rule stated in the text is said to have been since declared by the present Lord Chief Justice to be the most correct. See *Chitty on Bills*, 512. last ed.

peaching the plaintiff's title, without having given him previous notice of such intention. Indorsee v. indorser.

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A note, payable to bearer, is evidence, under the general count, of money received by the defendant (the maker) for the use of the plaintiff; so that the bearer may recover under the count for money had and received, without proving a debt due from the maker, or any other consideration between the maker and himself. (1) Such a note is in its nature negotiable; the maker undertakes to pay the bearer or any *bonâ fide* holder; and it is repugnant to the contract, that the maker of a note, or the drawer of a bill, should object, that the bearer has no right to demand payment. "The original advancer of the money," said Mr. Justice Yates, in the above cited case of *Grant v. Vaughan*, "manifestly appears to have had the money in the hands of the drawer, and he was therefore manifestly entitled to bring this action; and if he transfers his property to another person, that other person may maintain the like action; whoever has money in the hands of another, may bring such an action against him. The delivery of it," he added, "must indeed be proved; and the circumstances of the present case amount to a proof of delivery to the plaintiff." Proof under common counts.

Fourthly, of the action by an indorsee against the indorser of a note. Action by indorsee against indorser.

A promissory note, when indorsed, resembles a bill of exchange. It then becomes an order, by the indorser, upon the maker of the note, who is his debtor by the instrument, to pay to the indorsee. The indorser only undertakes, in case the maker of the note does not pay. The indorsee, therefore, is bound to apply to the maker of the note; he takes it upon that condition; and if, after the note becomes payable, he is guilty of neglect, and the maker should become insolvent, the indor-

(1) *Grant v. Vaughan*, 3 Burr. 1516. on Bills, 163. See the case of 1526. 1539. *Tatlock v. Harris*, *Waynam v. Bend*, 1 Campb. 175., 5 T. R. 174. 182. *Dimsdale v. Lancaster*, 4 Esp. N. P. C. 201. *Bayley*

Indorsee v.  
indorser.

ser is discharged. (1) In conformity with this principle, the declaration, in an action by the indorsee against the indorser of a note, after stating the making and the effect of the note and of the indorsement, proceeds to aver that the note on becoming payable, was duly presented to the maker, and that he refused to pay, of which refusal the defendant had notice.

The general rule, then, is, that the plaintiff in this action must at the trial prove the defendant's indorsement, the presentment to the maker, and notice to the defendant of the nonpayment, which notice is to be given within a reasonable time by the holder (2), or by some person who is a party to the bill. (3)

Proof of  
indorsement.

The defendant's indorsement is to be proved in the ordinary manner. And the proof of this indorsement will dispense with proof of the hand-writing of the maker; even if the note were forged, the indorser would still be liable. (4) His indorsement also admits all antecedent indorsements; so that the proof of them is unnecessary, although they are stated in the declaration. (5) When the indorsement is attested, (as it must be, where the note is for the payment of less than five pounds, otherwise the note is absolutely void) (6), the indorsement must be regularly proved by the subscribing witness. Intermediate indorsements between the plaintiff's and the defendant's need not be averred in the declaration; but if averred, they cannot be rejected as immaterial, and must be proved. (7) This distinction has been made, in point of proof, between antecedent and subsequent indorsements.

Presentment  
to maker.

As to the proof of presentment for payment, (which is necessary, because the indorser warrants only on the default of

(1) *Heylyn v. Adamson*, 2 Burr. 676. *Lambert v. Oakes*, 1 Ld. Raym. 443. 2 Str. 1087. *Bayley on Bills*, p. 47. (2) *Tindal v. Brown*, 1 T. R. 167. (3) *Wilson v. Swabey*, 1 Starkie, N. P. C. 34. (4) *Lambert v. Oakes*, 1 Ld. Raym. 443. *Bayley on Bills*, 217. *Free v. Hawkins*, Holt, N. P. C. 550. (5) *Critchlow v. Parry*, 2 Campb. 182. (6) By st. 17 G. 3. c. 30. s. 1. (7) See ante, p. 16.

the maker,) the plaintiff must show a demand on the maker, or that he has used due diligence to get the money from him. (1) He ought to prove a presentment at the place where the note is made payable; or, in case the maker has removed to another place, then at such other place, if it can be found (2); or, if the maker is dead, and his personal representative can on enquiry be found within a reasonable distance, the note should be presented to the representative. (3) It appears clearly, from what has been already stated on this subject, that if a place for payment is mentioned in the body of the note, it is a substantial part of the contract (4), and ought to be alleged in the declaration; and that an omission of the place would be a fatal variance. (5) When no particular place for payment is specified in the note, it is sufficient to make the demand at the house of the maker; a personal demand is not necessary. (6) If the declaration allege, that the note was presented and payment refused, this allegation will not be supported by proving, that the maker could not be found at the time when the note was payable. (7)

Indorsee v.  
indorser.

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The object in giving notice to the defendant, is to apprise him of the non-payment, that he may take the necessary measures to obtain payment from the party liable to him. Though there is no prescribed form, the notice must import, that the holder considers the indorser liable, and expects payment from him: the object of this is, that he may have his remedy against the party liable to him; and after the notice, it becomes his business to take up the note. (8) This notice should be proved to have been given within a reasonable time after the refusal of payment. To such of the parties as reside in the place, where the presentment was made, the notice must

Notice of dis-  
honour.

(1) 2 Burr. 677., by Ld. Mansfield C. J. in *Heylyn v. Adamson*.

(2) *Collins v. Butler* 2 Stra. 1086. *Bayley on Bills*, 95. See ante, pp. 10, 11., as to presentment.

(3) *Bayley on Bills*, p. 95.

(4) See ante, p. 10.

(5) *Roche v. Campbell*, 3 Campb. N. P. C. 247.

(6) *Saunderson v. Judge*, 2 H. Bl. 511.

(7) *Bayley on Bills*, p. 137., citing *Leeson v. Pigott*.

(8) *Tindal v. Brown*, 1 T. R. 170.

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indorser.

be given, at the farthest, before the expiration of the day following the failure; to those who reside elsewhere, by the next post (1); but if, in any particular place, the post should go out so early after the receipt of the intelligence, as to make it inconvenient to require a strict adherence to the general rule, in that case it would not be reasonable to require the notice to be sent till the second post. (2)

Notice by the  
post.

If the notice of non-payment has been sent in a letter by the post, in the ordinary course, which is a sufficient notice, (for it would be unreasonable to expect the party to send notice by a special messenger, or by any extraordinary mode) (3), the fact of putting the letter into the post, is to be regularly proved. (4) The conveyance by the two-penny post in London is sufficient (5), if the parties live within its limits; and it is not material, whether they live near each other, or at some distance; but the letter, which conveys the notice, should be proved to have been put into a receiving-house at such an hour, that, according to the course of the post, it ought to have reached its destination on the day, when the party would be entitled to receive the notice of dishonour. (6) Where there is no post, it will be sufficient to send notice by the ordinary mode of conveyance. (7) Putting a letter into the post is only one mode of giving notice; where both parties are residing in the same post town, sending a clerk is a more regular and less exceptionable mode. (8) Or proof that a letter, containing the proper notice, has been left at the defendant's house, will be sufficient. (9)

(1) Bayley on Bills, 124. Chitty on Bills, last ed. p. 400.

(2) 6 East Rep. 10, 11.

(3) Saunderson v. Judge, 2 H. Bl. 509. Kufh v. Weston, 3 Esp. N. P. C. 54.

(4) See vol. 1. part 2. ch. 8. s. 2.

(5) Scott v. Lifford, 9 East, 347. 1 Campb. N. P. C. 246. S. C.

(6) Smith v. Mullett, 2 Campb. N. P. C. 308. Hilton v. Fairclough, 2 Campb. 633.

(7) Bayley on Bills, 128.

(8) Crosse v. Smith, 1 Manle & Selw. 545, by Lord Ellenborough. Baacroft v. Hall, Holt, N. P. C. 476.

(9) Stedman v. Gooch, 1 Esp. N. P. C. 5. As to the effect of the post-mark, see Kent v. Lowen, supra, p. 16. (1), and Langdon v. Hulls, 5 Esp. 158.



The contents of a letter, or other written notice, sent to the defendant by the post, or left at his house, may be proved by a duplicate-original, without previous proof of a notice to the defendant to produce the original at the trial of the cause. (1) In the late case of *Roberts v. Bradshaw* (2), a witness stated, that by the direction of the plaintiff, on a particular day, he had compared two papers with each other, one of which he produced, and it purported to be a notice of the dishonour of the bill in question; Lord Ellenborough held, that this was good evidence of the contents of the letter. The witness then stated, that on the following day he carried a letter from the plaintiff to the defendant, but did not know its contents; and, in order to obviate the deficiency of proof, as to the identity of the letter, a notice was proved, calling upon the defendant to produce a letter (of a certain date, &c.) containing information of the dishonour. An objection being taken to this evidence, as insufficient, Lord Ellenborough held, that, as it clearly appeared what letter was the object of the plaintiff's notice, the defendant, by the production of the letter, might show, if the fact were so, that its contents had no reference to the dishonour of the bill. This is the first time, added Lord Ellenborough, that the identity of such a letter has been so minutely scrutinized, and the proof might, in many instances, be attended with great difficulty; as, where letters, after being written, are placed upon the table, it might be exceedingly difficult to identify them with those afterwards put into the post-office. The proposed evidence was therefore admitted as sufficient proof of the notice of the dishonour; and, on an application for a new trial on this ground, the Court of King's Bench refused the rule. If no copy of the original has been kept, a notice should be given to the defendant or his attorney, to produce the original (3); and after proof of such notice, the contents of the original may be proved by parol evidence.

*Indorsee v. indorser.*

*Proof of contents of notice.*

(1) *Ackland v. Pearce*, 2 Campb. 501., by Le Blanc J. *Roberts v. Bradshaw*, 1 Starkie, 28., by Lord Ellenborough. *Langdon v. Hulls*, 5 Esp. C. 156. See vol. 1. part 2. ch. 8. s. 2. (2) 1 Starkie, N.P.C. 28. *Action by indorsee v. drawer.* See also *Putt v. Fairclough*, stated in vol. 1. (3) *Shaw v. Markham*, Peake, N.P.C. 164.

Indorsee v.  
indorser.

Notice of dishonour, when dispensed with.

The proof of the presentment, and of the notice of dishonour, will be dispensed with, if the defendant, knowing of the default, has paid any part of the money (1), or promised to pay after the note became due (2); for this is an admission on his part, that the plaintiff had a right to resort to him upon the note, and that he himself had received no damage from the want of notice. But if the drawer or indorser, after being arrested, merely offers, by way of compromise, without acknowledging his liability, to give a bill for the sum demanded, this will not dispense with proof of notice of the dishonour. Such an offer is not a waiver of the objection. (3) Nor will the notice be dispensed with, by proving that no consideration passed between the maker and the payee (the indorser), or by showing an understanding between the parties that the note should not be put in suit. (4)

Money  
counts.

An indorsement is evidence of money lent by the indorsee to the indorser (5); so that if the plaintiff fail upon the special count, in consequence of a material variance, he will not be precluded from recovering on the common money count. The indorser of a promissory note or bill of exchange, when he receives the money from the indorsee, holds it in trust to be repaid to the holder, if he shall fail to obtain it from the acceptor or maker, after using due diligence, and giving proper notice. He indorses it with his name, in order to give it credit; and his signature cannot have this effect, unless it is taken as the sign of an express contract to pay the money to the holder.

(1) *Vaughan v. Fuller*, 2 Stra. 1246. *Horford v. Wilson*, 1 Taunt. 12.

(2) *Rogers v. Stephens*, 2 T. R. 715. *Lundie v. Robertson*, 7 East, 231. *Potter v. Rayworth*, 13 East, 417. *Wilkes v. Jacks, Peake*, N.P.C. 202. *Taylor v. Jones*, 2 Campb. N. P. C. 105. *Greenway v. Hindley*, 4 Campb. N. P. C. 52.

(3) *Cummings v. French*, 2 Campb. N. P. C. 106. n.

(4) *Free v. Hawkins*, 8 Taunt. 92. *Holt*, N.P.C. 550. And see *Bayley on Bills*, 136. n.

(5) *Kessebower v. Tims*, MS. case, cited in *Bayley on Bills*, 164.

## SECT. II.

*Of Evidence in Assumpsit on Bills of Exchange.*

IN treating of this subject, it is proposed to consider, first, the action by the payee of a bill against the acceptor; secondly, that by the indorsee against the acceptor; thirdly, that by the drawer against the acceptor; fourthly, the action by the payee against the drawer; fifthly, that by the indorsee against the drawer; sixthly and lastly, the action by the indorsee against the indorser.

I. The first and simplest case to be considered, is an action by the payee against the acceptor.

The declaration, in this action, after stating the drawing of the bill, and describing its legal effect and substance (1), proceeds to state the acceptance, and concludes with alleging the defendant's obligation to pay according to the tenor of the bill and of his acceptance.

Action by  
payee against  
acceptor.

The bill itself, when produced, will show, whether its legal effect has been correctly described in the declaration. If the acceptor has improperly detained the bill in his possession, a notice should be served upon him or his attorney, requiring him to produce it at the trial; and on his default, parol evidence of the contents will be admitted. (2)

A parol acceptance has been held to be sufficient; but the most usual and regular mode of acceptance is by writing on the bill. And, by an act of the last session, it has been enacted (3), that no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless the acceptance be in writing on the bill, or, if there be more than one part of the bill, on one of the parts.

Acceptance.

An acceptance may be either general or special and qualified. An acceptance, by which the bill is made payable at a banker's

(1) See ante, p. 2.

(2) 5 East, 477. See vol 1. part 2. ch. 8. s. 2.

(3) St. 1 & 2 G. 4. c. 78. This act

took effect from the 1st of last August.

Payee v. acceptor.

or other place, has been held to be a special and qualified acceptance; but the act of last session, above referred to (1), enacts, that if any person shall accept a bill of exchange, payable at the house of a banker or other place, without any further expression in the acceptance, such acceptance shall be taken to be to all intents and purposes, a general acceptance; but if the acceptor shall in his acceptance express, that he accepts the bill, payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be taken to be, to all intents and purposes, a qualified acceptance; and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place.

Proof of acceptance.

A written acceptance is proved by proof of the acceptor's hand-writing. If the acceptance is by an agent, his authority as well as his hand-writing must be proved (2); and if the authority is created by a power of attorney, the original power ought to be produced, as the best evidence of his appointment. (3) When the action is against several persons as acceptors, it will be necessary to prove the acceptance of each (4); for the acceptance of one will not bind another, unless they were connected in partnership. If, indeed, they were partners, it will be sufficient to prove the partnership, and that one of them accepted. (5) The acceptance does not prove the partnership, but if the defendants were partners, they are all liable to a *bond fide* holder on the acceptance of any one of the firm. (6) This liability, arising from the relation of partners, may be removed, by proving a notice to the plaintiff, that the rest of the firm would not be answerable on such an acceptance. (7)

Admission of acceptance.

The acceptor's acknowledgement of his hand-writing, or a promise to pay, or a payment of part of the money, or his ask-

(1) St. 1 &amp; 2 G. 4. c. 78.

(2) See *supra*, p. 8.(3) *Johnson v. Mason*, 1 Esp. N.P.C. 89. As to declarations made by agents, and the proof of their agency, see vol. 1. part 1. ch. 5. s. 4.(4) *Gray v. Palmers & Hodgson*, 1 Esp. N.P.C. 135. Bull. N.P. 279.(5) *Mason v. Rumsey*, 1 Campb. N. P. C. 584.(6) *Lord Galway v. Matthew*, 1 Campb. N. P. C. 403.

(7) As to proof of notice in newspapers. See vol. 1. part 2. ch. 6.

ing time for payment, are so many admissions of his liability, and dispense with the necessity of proving a written acceptance. (1) Payee v. acceptor.  
 An admission by one of several acceptors, that he accepted, is evidence against him, not against the others. (2) But where the acceptors are partners in trade, and one partner accepts for the firm, his admission of his acceptance (though not evidence of the partnership against the others, who appear and defend,) will be good evidence of his acceptance, as against the whole aggregate body. (3) And in a late case, where it appeared, that all the defendants, excepting one, had been outlawed, a letter, written by that one, admitting his partnership with the co-defendants, was received as evidence of the partnership (4); for, as Lord Ellenborough said, the record in this action would not be sufficient evidence in any future action that might be brought by the present defendant against the co-defendants for contribution, to prove that they were parties to the promise, and it would be incumbent on him to prove the fact by ulterior evidence. The circumstance of some of the defendants in this case having been outlawed would not dispense with the proof of their joint liability, although the defendant, who pleaded to the action, is alone, in justice, liable to the debt. (5)

The defendant, whose name is on the bill as acceptor, will not be precluded from proving the acceptance forged, by the circumstance of his having desired the person, who demanded payment of the bill, to call again for payment on a future day; and he has therefore been allowed to prove the acceptance forged by the drawer. But if it be proved that he has on former occasions accepted bills, similar to that which is the subject of the action, and on which the same drawer, who was connected with the defendant in business, is supposed to have written acceptances in the defendant's name, such previous conduct explains his conduct on the particular occasions in question, and his request to the person demanding payment, to call

(1) *Helmsley v. Loader*, 2 Campb. 450. See *supra*, p. 24.

(2) See *Gray v. Hodgson and Palmers*, ante, p. 26. (4)

(3) See vol. 1. p. 92. *Hodenpyl*

*v. Vingerhoed and Another*, MS. case in last ed. of *Chitty on Bills*, p. 489.

(4) *Sangster v. Mazarredo and Others*, 1 Starkie, N. P. C. 161.

(5) *Shirreff v. Wilks*, 1 East, 48.

Payee v. acceptor.

again on a future day for payment, will, under such circumstances, be an adoption of the acceptance, and makes him liable to pay the bill. (1)

Date of acceptance.

Where the bill was payable a certain time after sight, and the defendant's signature as acceptor was proved, but the date of the acceptance over his name was in a different handwriting, and an objection was taken, that it did not appear when the bill was accepted, or whether it was due before the commencement of the action, Lord Ellenborough left it to the jury to presume, in the absence of all proof to the contrary, that the date of the acceptance was written with the privity of the defendant, at the time of his accepting the bill. (2)

Proof of presentment.

If the acceptance is general, it will not be necessary to allege a presentment; and, if it should be alleged in the declaration, yet it need not be proved. But in the case of a special and qualified acceptance (3), it has been lately determined by the House of Lords, after much difference of opinion in the Courts below, that the declaration in an action against the acceptor must aver presentment at the place named, and the averment must be proved. (4) It will not, however, be necessary to give the acceptor notice of the non-payment of the bill; since the persons, appointed by the acceptor to pay, may be properly considered his agents, and their refusal would in that case be considered a refusal by him. (5)

Money counts.

If the plaintiff fail on the special count, in consequence of a variance between the description of the bill in the declaration and the bill produced, can he recover on the common count for

(1) *Barber v. Gingell*, 3 Esp. N.P.C. 80.

(2) *Glossop v. Jacob*, 4 Campb. 227. The witnesses in this case stated, that when a bill, payable after sight, is to be accepted, it is usual for a clerk to write upon it the word "accepted," with the date, and that then the drawee subscribes his own name.

(3) As to qualified acceptances, see *supra*, p. 26.

(4) *Rowe v. Young*, 2 Brod. &

Bing. 165. Action by indorsee v. acceptor. The acceptance in this case was, to pay at a banker's; which was then a qualified acceptance. Such an acceptance is now to be taken to be a general acceptance. See the st. 1 & 2 G. 4. c. 78., stated in p. 26. *supra*.

(5) *Treacher v. Hinton*, 4 Barn. & Ald. 413. See also *Smith v. Thatcher*, 4 Barn. & Ald. 201. and *Pearse v. Pemberthy*, 3 Campb. 261., stated *supra*, p. 11.

money had and received, merely on proving the bill, without proof of any consideration? An acceptance is an appropriation of the money, specified in the instrument, to the use of the payee or holder; it is, in effect, an acknowledgement by the acceptor, that he has received from the drawer such a sum on account of the holder; and in this point of view, it should seem that the payee might recover on such general count. (1) He would not be entitled to recover, generally speaking, on the count for money paid to the use of the acceptor; for, as Lord Ch. B. Eyre said, in the case of *Gibson v. Minet* (2), "the presumption of evidence, which the writing affords, has no application to the assumpsit for money paid by the payee, or holder of a bill, to the use of the acceptor; it must be a very special case, which will support such an assumpsit."

*Indorsee v. acceptor.*

II. Secondly, of the action by the indorsee against the acceptor.

*Action by indorsee against acceptor.*

The title of the indorsee arises from the indorsement; the liability of the acceptor, from his acceptance. The acceptance, therefore, is first to be proved. As to the proof of this, enough has been said in a former page. (3)

*Proof of acceptance.*

An acceptance admits the ability of the drawer to make the bill. (4) It is no defence, therefore, for the acceptor, that the drawer was an infant. (5) If the acceptance was made after sight of the bill, it admits the signature of the drawer, as well as his ability. (6) Such an acceptance makes the acceptor liable as against a third person, although the bill is forged; it is incumbent on him to be satisfied respecting the drawer's signature, before he accepts. (7) If the bill purports to be drawn by an

*Effect of acceptance.*

(1) See *Bayley on Bills*, p. 163. *Vere v. Lewis*, 3 T. R. 183. *Supra*, p. 12. See also *Hard's case*, *contra*, 1 Salk. 23., stated in 1 Selw. N. P., tit. *Assumpsit*. II.

(2) 1 H. Black. 602. See *Israel v. Douglas*, 1 H. Bl. 242.

(3) See *supra*, p. 26.

(4) *Bayley on Bills*, 217. *Robinson v. Yarrow*, 7 Taunt. 455. 1 Moore, 150. S. C.

(5) *Taylor v. Croker*, 4 Esp. N. P. C. 187.

(6) *Wilkinson v. Lutwidge*, 1 Str. 648. *Jenys v. Fawler*, 2 Str. 946. *Bayley on Bills*, 217. *Robinson v. Yarrow*, 7 Taunt. 455.

(7) *Leach v. Buchanan*, 4 Esp. N. P. C. 226. 1 T. R. 655. 3 Burr. 1557. 6 Taunt. 83. 4 Maule & Selw. 15.

Indorsee v. acceptor.

agent, the acceptance will dispense with proof of his authority. (1) Or, if it purport to be made by several persons, as a firm, and in fact only a single person constitutes the firm, yet the defendant is bound by his acceptance; for he ought to have known the fact, before he accepted, and after having accredited the description of the drawer, he is precluded from averring, that it was not drawn (as it purports to have been, and as described in the declaration) by an aggregate firm. (2)

Proof of indorsement.

The acceptance does not admit the signature of the indorser (3); even if the bill is payable to the drawer's order, and he indorses it, yet his hand-writing, as *indorser*, is not admitted by the acceptance, although his hand-writing, as *drawer*, is admitted. (4) And though the acceptance admits a procuration to draw the bill, yet it will not admit a procuration to indorse. (5) The indorsee will therefore be obliged to prove the indorsement of the party, who indorsed immediately to him. However, although the acceptance does not admit the hand-writing of the indorser, even though he also drew the bill, yet it has been held, in a *nisi prius* case, to operate as an admission, that the persons, in whose favour the bill was drawn, and one of whom indorsed it in the name of himself and the other payees, are partners, provided this indorsement was upon the bill at the time of the acceptance; Lord Ellenborough held, in such a case, that the defendant, having accepted the bill indorsed by one for himself and the others, could not afterwards dispute the regularity of the indorsement with respect to the partnership. (6)

If there are several indorsements, the first indorsement ought to be proved (7), and all the other indorsements, which are stated in the declaration, though some may have been

(1) *Porthouse v. Parker*, 1 Campb. N. P. C. 82. *Robinson v. Yarrow*, 7 Taunt. 455.

(2) *Bass v. Clive*, 4 Maule & Selw. 13. (3) *Smith v. Chester*, 1 T. R. 654. *Bayley on Bills*, 218. *Robinson v. Yarrow*, 7 Taunt. 455. 1 Moore, 150. S. C.

(4) *Bosanquet v. Anderson*, 6 Esp. N. P. C. 45. *Macfarson v. Thoytes*, Peake, N. P. C. 20.

(5) *Robinson v. Yarrow*, 7 Taunt. 455.

(6) *Jones v. Radford*, 1 Campb. 83. n. See *Carvick v. Vickery*, Doug. 650.; and *Hankey v. Wilson*, Say. 223.; and *Bayley on Bills*, 218.; and *Chitty on Bills*, 608. last ed.

(7) *Smith v. Chester*, 1 T. R. 654. As to the proof of the indorsement, see ante, p. 20.



stated unnecessarily. (1) However, the necessity of proving the intermediate indorsements, stated in the declaration, will be dispensed with, by showing that the acceptor, when the bill so indorsed became due, promised to pay, or offered to give the holder another bill in lieu of it. (2)

Indorsee v. acceptor.

If several plaintiffs sue as indorsees, and the bill is indorsed in blank, it will not be necessary for them to prove that they are in partnership, or that the bill was delivered to them jointly. (3) But if the bill is indorsed specially to a firm, the partnership must be proved to consist of the parties named on the record. (4)

Presentment for payment, in the case of a general acceptance, need not be averred; and, if averred, need not be proved. But if the acceptance is special and qualified, (as to pay at a banker's house or other place only, and not elsewhere,) the declaration must aver presentment at the place, and the averment must be proved. (5) Notice to the acceptor, however, of the non-payment at the appointed place, will not be necessary. (6)

Presentment for payment.

An acceptance is evidence of money had and received by the acceptor to the use of the holder (7); it is an appropriation of so much money to be paid to the person who should become the holder of the bill. (8) If the indorsee, therefore, fail on the special count, in consequence of a material variance, he may recover on this money count, without proof of a consideration passing between him and the acceptor. But, (as Ch. J. Eyre said, in the case of *Gibson v. Minet*) (9), when the

Money counts.

(1) *Waysam v. Bend*, 1 Campb. N. P. C. 175. *Bosanquet v. Anderson*, 6 Esp. N. P. C. 43.

(2) *Sir Jos. Hankey v. Wilson, Sayer*, 225. *Bosanquet v. Anderson*, 6 Esp. N. P. C. 45. *Sidford v. Chambers*, 1 Starkie, N. P. C. 526.

(3) *Ord v. Portal*, 5 Campb. N. P. C. 239. *Rordanz v. Leach*, 1 Starkie, N. P. C. 446. *Macbell v. Kinnear*, 1 Starkie, N. P. C. 499.

(4) 2 Campb. 240.

(5) *Rowe v. Young*, in error, in House of Lords, 2 Brod. & Bing. 165. See *supra*, p. 26. 28.

(6) *Treacher v. Hinton*, 4 Barn. & Ald. 413. *Supra*, p. 28.

(7) *Le Sage v. Johnson, Forrest*, 25. *Bayley on Bills*, 164. *Highmore v. Primrose*, 5 Maule & Selw. 65. ante, p. 28.

(8) *Lord Kenyon*, in *Tatlock v. Harris*, 5 T. R. 182. And see *Vere v. Lewis*, 3 T. R. 182. *Master v. Miller*, 4 T. R. 339. *Israel v. Douglas*, 1 H. Bl. 242. Whether the bill is evidence of money paid by the holder to the use of the acceptor, see ante, p. 27., and 1 H. Bl. 602.

(9) 1 H. Bl. 602.

Indorsee v. acceptor.

bill is offered as evidence of the general duty to pay, it is but evidence; and any of the presumptions, which the writing affords, may be contradicted by other evidence; and from the whole of the evidence the jury must draw the conclusion of fact, whether so much money was lent, or so much had and received. In the case, therefore, of *Bennett v. Whitwell* (1), where the bill was incorrectly stated, and the plaintiff was consequently obliged to resort to the money counts, the evidence was, that when the defendant accepted the bill, (which was for 30l.,) he said, that, though the drawer had not remitted to him, he expected that he would, and that, as he had a bill of his for 80l., which would be paid, he would take all risks upon himself; the Court said, that, if that bill was paid, the action for money had and received would be maintainable, on the ground of the defendant's specific appropriation of that money to the payment of the plaintiff's demand; but that, as the declaration was upon the bill for 30l., it was a surprise upon the defendant to call for proof of the non-payment of the other bill; and therefore it would be too much to presume payment of that bill.

Competency of witness.

The drawer is not a competent witness for the acceptor of an accommodation-bill, to prove that the holder received the bill on an usurious consideration; for he is bound to indemnify the acceptor against the consequences of an acceptance made for his accommodation, and will be liable to the acceptor, not only for the principal sum, but also for all damages sustained by the acceptor in this suit; for the drawer of an accommodation-bill is bound to indemnify the acceptor against the consequence of an acceptance made for the accommodation of the drawer. (2) The drawer is a competent witness for the plaintiff, to prove the hand-writing of the acceptor, although forgery of the defendant's name is imputed to the witness (3); or to prove, for the defendant, that the bill has been paid. (4)

(1) 5 Bos. & Pull. 559.; and see *Israel v. Douglas*, 1 H. Bl. 259.

(2) *Jones v. Brooke*, 4 Taunt. 464. See vol. 1. p. 61. *Brard v. Ackerman*, 5 Esp. N.P.C. 119.

(3) *Dickinson v. Prentice*, 4 Esp. N.P.C. 32.

(4) *Humphrey v. Moxon, Peake*, N.P.C. 52.

III. Thirdly, of the action by the drawer against the acceptor.

Drawer v. acceptor.

Action by drawer against acceptor.

The drawer, when he takes up the bill after its negotiation, is referred back to his original contract with the acceptor; the acceptor is discharged with respect to the drawer, until the bill returns to the drawer; but when that happens, the right of the drawer revives, and the bill, which is the evidence of the contract of the acceptor, proves that his undertaking was to pay a certain sum of money at a fixed time. (1)

The declaration, in an action by the drawer against the acceptor, states the substance of the bill, the acceptance by the defendant, the presentment to him for payment, and his refusal to pay the money specified; and then avers, that the bill was returned to the plaintiff, and that he, as drawer, was obliged to pay. The acceptance, therefore, the presentment for payment, the dishonour of the bill, and the payment of the bill by the plaintiff, are to be proved at the trial.

The proof of acceptance has been already considered. (2) The acceptance is evidence that the acceptor received value from the drawer, who will not be obliged in the first instance to prove, that he had effects in the acceptor's hands; but if this is the ground of defence, the burthen of proof will be on the defendant.

The facts of presentment for payment, and the acceptor's refusal, are best proved by the person who actually presented. (3) It has been before observed, that a promise to pay, made by the defendant, or any other admission of his liability on the bill, will dispense with the proof of these facts. (4)

Presentment and dishonour.

(1) Lawrence, J., in *Cowley v. Dunlop*, 7 T. R. 572.

(2) *Supra*, p. 26.

(3) As to proof of presentment, see *supra*, 28.

(4) *Supra*, p. 24.

Drawer v. acceptor.

Payment by plaintiff.

The payment of the money, mentioned in the bill, may be proved by the payee or indorsee, who returned the bill. A general receipt on the back of the bill is not of itself evidence of the payment by the drawer, though he produces the bill (1); for it may be, that the drawer and acceptor have settled their accounts, and on such settlement the bill may have been delivered up; the receipt, therefore, requires some explanation, before it can be admitted as evidence of payment by the drawer on the return of the bill.

**Money counts.** If the drawer should, in consequence of a material variance, fail on the special count, it seems doubtful, whether he can recover on the common count for money had and received, without proof of a consideration passing between the parties. (2) If indeed the bill is drawn payable to the order of the drawer, so that the drawer is also the payee, and there are only two parties to the instrument, the case is the same as between the indorsee and maker of a note; and the plaintiff may perhaps be allowed to recover on the count for money had and received. (3)

The drawer of a bill, payable to a third person, cannot recover upon the count for money paid to the acceptor's use, without proof of a consideration between him and the acceptor. In the case of *Cowley v. Dunlop* (4), Mr. Justice Lawrence, with reference to such a case, said, "In short, the question comes to this, whether the drawer of a bill of exchange, who is obliged to take it up after having negotiated it, is not confined to his action on the bill to recover against the acceptor? And it seems to me that he is, for I see no reason to raise an implied assumpsit *as for money paid* by the drawer for the acceptor, when the contract, arising out

(1) *Scholey v. Walsby*, Peake, N. P. C. 24.

(2) See *Thompson v. Morgan*, 3 Campb. 101. *Scholey v. Walsby*, Peake, N. P. C. 24.

(3) *Thompson v. Morgan*, 3 Campb. 101.

(4) 7 T. R. 572.

of the bill, and the custom are fully sufficient to enable him to recover what he may be obliged to pay on the acceptor's refusal." Payee v.  
drawer. \_\_\_\_\_

IV. Fourthly, of the action by the payee against the drawer. Action by  
payee against  
drawer.

The situation, in which the several parties to a bill of exchange stand towards each other, has been concisely described by Lord Mansfield in the following terms (1): "A bill of exchange is an order or command to the drawee, who has, or is supposed to have, effects of the drawer in his hands to pay. When the drawee has accepted, he is the original debtor; and due diligence must be used in applying to him. The drawer is only liable in default of payment by the acceptor, due diligence having been used; and therefore, if the acceptor is not called upon within a reasonable time after the bill is payable, and happens to break, the drawer is not liable at all."

The payee may sue the drawer, in consequence of the drawee's refusal to accept, or in consequence of his refusal to pay after acceptance. The action for non-acceptance may be brought immediately on the refusal to accept, though before the expiration of the time limited for payment; the undertaking of the drawer, that the drawee should give him credit, not being performed. In the first case, the declaration, after commencing in the usual manner with stating the substance of the bill, alleges, that the bill was presented to the drawee for his acceptance, and that he refused to accept or pay the money specified, of which refusal the defendant had notice. The points, therefore, to be proved at the trial, are the signature of the defendant as drawer, the presentment, the refusal to accept, and the subsequent notice to the defendant.

In the case of an action by the payee against the drawer, in consequence of the drawee's refusal to pay, the declaration

(1) *Heylyn v. Adamson*, 1 Burr. 674.

Payee v.  
drawer.

varies from that in the former case, in omitting the allegation of a presentment for acceptance, and averring that the bill, when it became due and payable, was presented for payment, and payment refused. The facts, therefore, to be proved in support of this action, are the drawer's signature, the presentment to the drawee for payment, his refusal to pay, and notice to the defendant of such dishonour. And if the declaration allege an acceptance by the drawee, (although such an averment is unnecessary, except in the case of bills payable within a limited time after sight (1), the acceptance must be proved. (2)

Drawer's signature and  
presentment.

As to the first point, of the drawer's signature, enough has been already said, in treating of the action on a promissory note by the payee against the maker. (3) With respect to the presentment, the plaintiff ought to show that he presented the bill in proper time, at a seasonable hour, at the place where the bill was payable (4); and the bankruptcy or known insolvency of the drawee is not an excuse for neglecting to make a presentment. (5) If the bill is presented before it becomes due, and the drawee on such presentment informs the holder that he had then no effects in his hands, adding, that the bill was not due, and that the drawer would probably provide effects by the time, this will not dispense with the necessity of proving a regular presentment; for although it may not be likely that the drawee would accept the bill, yet it is possible that he might change his mind.

Non-acceptance or non-payment.

A presentment for acceptance is not necessary, except upon bills payable within a limited time after sight (6); but if it is made, however unnecessarily, the payee must give notice of his failure to procure an acceptance. (7) The refusal to accept,

(1) Bayley on Bills, p. 100.

(2) Jones v. Morgan, 2 Campb. 474. As to proof of acceptance, see ante, p. 26.

(3) See ante, p. 8.

(4) As to proof of presentment, see ante, p. 11. 20. Bayley on Bills, p. 94, 95.; and as to acceptance to

pay at a specific place, see ante, p. 26.

(5) Esdaile v. Sowerby, 11 East, 114. Bowes v. Howe, 5 Taunt. 30.

(6) Bayley on Bills, p. 100.

(7) Blesard v. Hirst, 5 Burr. 2670. Goodall v. Dolley, 1 T. R. 712. Bayley on Bills, 115.

or to pay, is to be proved by the person who presented for acceptance or payment; and proof of the notice of refusal will vary with the mode in which the notice was given. (1)

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drawer.

The notice of such refusal must be reasonable; and the question, whether it is reasonable, is a question of law to be determined by the Court, upon the facts ascertained by the jury. The result of the several decisions, as to the proper time of giving the notice, is laid down as follows (2): "The general rule seems to be, with respect to persons living in the same town, where the presentment was made, that the notice shall be given by the next day; and with regard to such as live in different places, that it shall be sent by the next post. But if in any particular place the post should go out so early after the receipt of the intelligence, that it would be inconvenient to require a strict adherence to the general rule, then with respect to a place so circumstanced, it would not be reasonable to require the notice to be sent, till the second post." Sending notice by the post is sufficient, though it may not appear to have been ever received. (3) If there is no post, it will be sufficient to send notice by the ordinary mode of conveyance; as, in the case of a foreign bill, to send by the first regular ship bound for the place, to which the notice is to be directed. (4) Ignorance of the place of the drawer's residence is an excuse for not giving him due notice of the dishonour; and whether the party has used due diligence to discover the place of residence, is a question for the jury. (5) The proof of the notice of dishonour has been before considered. (6)

(1) See ante, p. 21.

(2) By Lawrence J. in *Darbishire v. Parker*, 6 East, 10. *Langdale v. Trimmer*, 15 East, 291. The holder may, of course, give notice of the dishonour on the same day that the payment is refused. *Burbridge v. Manners*, 3 Campb. 193. See the rule distinctly and plainly stated in 2 Barn. & Ald. 500.

(3) As to the mode of giving notice by the post, or otherwise, see ante, p. 22.

(4) *Muilman v. D'Eguino*, 2 H. Bl. 565.

(5) *Bateman v. Joseph*, 12 East, 453. *Beveridge v. Burgis*, 3 Campb. 262.

(6) Ante, p. 21.

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drawer.

Notice to one of several partners is a sufficient notice to all. When, therefore, a bill has been drawn by a firm upon one of the partners, and by him accepted and dishonoured, it is unnecessary to give notice of such dishonour to the firm; for this must necessarily be known to one of them, and the knowledge of one is considered as the knowledge of all. (1) And, in such a case, proof of the acceptance of the bill by the drawee, is evidence, in an action against all the drawers, that the bill was regularly drawn. (2)

Protest

Where a foreign bill is presented, and acceptance or payment refused, a protest is essentially necessary (3); it has been thought necessary also in the case of an inland bill, when a protest is averred. (4) In an action on a foreign bill, presented abroad, the dishonour of the bill will be proved by producing the protest, purporting to be attested by a notary public, or, if there is not any notary near the place, purporting to have been made out by an inhabitant in the presence of two witnesses (5); proof of the notary's attestation or of the affixing of the seal will not be requisite. (5) But the presentment of a foreign bill in this country must be proved in the same manner, as if it were an inland bill or promissory note. (6) If the drawer resides abroad, a copy, or some memorial, of the protest ought to be sent to him, accompanying the notice of the non-acceptance or non-payment; but if he resides in this country, though at the time of the non-acceptance he may happen to be out of the country (7), or if he has returned from abroad before the bill became due (8), notice of the protest will not be requisite, and notice of the dishonour is sufficient. "If the party is abroad," said Lord

(1) *Porthouse v. Parker*, 1 Campb. 32, by Ld. Ellenborough C. J.

(2) *Ib.*

(3) *Bayley on Bills*, 118. *Gale v. Walsh*, 5 T. R. 259.

(4) *Boulager v. Talleyrand*, 2 Esp. N. P. C. 550, by Ld. Kenyon. However, the plaintiff afterwards proved a protest, and recovered.

(5) *Anonym. Case*, 12 Mod. 345. *Rep. temp. Holt*. 297. S. C. *Bayley on Bills*, 226.

(6) *Chesmer v. Noyes*, 4 Campb. 129.

(7) *Cromwell v. Hynson*, 2 Esp. N. P. C. 511.

(8) *Robins v. Gibson*, 1 Maule & Selw. 288. 3 Campb. 335. S. C.



Ellenborough in the last cited case, "he cannot know of the protesting of the bill, except by having notice of the protest itself; but if he be at home, it is easy for him to ascertain that fact by making inquiry."

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drawer.

Proof that the drawer had no effects in the hands of the drawee, dispenses with notice of the dishonour (1); or, to speak more correctly, notice will be dispensed with, when the drawer must have known at the time, that he had no effects to answer his bill. (2) The law requires notice to be given for this reason; because it is presumed, that the bill is drawn on account of effects which the drawer either has, or is about to have, in the hands of the drawee; and if the drawer has notice that the bill is not accepted, or not paid, he may immediately withdraw the effects, or stop them before they reach the drawee's hands; but if he knows, that he shall have no effects in the other's hands, then he cannot be injured for want of notice, and he is apprised, also, that the bill, when presented, will not be paid. (3) The principle, on which the rule is founded, is, that the party, who cannot be prejudiced by want of notice, shall not be entitled to require it. But it is not to be understood with such latitude, as to excuse the want of notice, on proving that the omission of notice could not in point of fact have prejudiced the drawer (4); a sort of inquiry, which would often lead to the most indefinite and complicated investigations. Nor is the rule, laid down in the case of *Bickerdike v. Bollman*, to be carried to such an extent, as to dispense with notice, where the drawer has effects in the hands of the drawee at the time when the bill became due, although he might have had none when the bill was drawn (5); or where there is a running account with the drawee, and a fluctuating

Notice when  
dispensed  
with, or pre-  
sumed.

(1) *Bickerdike v. Bollman*, 1 T.R. 410. As to this case, see 12 East, 177., 4 Maule & Selw. 231., 3 Barn. & Ald. 623. 625. The rule applies to foreign, equally with inland bills; *Legge v. Thorpe*, 12 East, 171., and cases there cited.

(2) By *Le Blanc J.*, in *Legge v. Thorpe*, 12 East, 177.

(3) See *Bickerdike v. Bollman*, 1 T.R. 410., and *Cory v. Scott*, 3 Barn. & Ald. 622. 624. 625.

(4) *Deanis v. Morrice*, 3 Esp. N. P. C. 158. *Rogers v. Stephens*, 2 T. R. 718.

(5) *Thackray v. Blackett*, 3 Campb. 164.

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drawer.

balance between them (1); or where the bill is drawn in the fair and reasonable expectation, that, in the ordinary course of mercantile transactions, it would be accepted or paid when due. (2)

In the case, above mentioned, where the drawer knows, at the time of drawing, that he will have no effects to answer his bill, when it becomes due, it seems that a general allegation of notice, ("of which said several premises the defendant afterwards, to wit, &c., had notice") would be sufficient, so as not to make the proof of notice necessary; for he must know, that the bill will be dishonoured, and this is evidence whence a jury might presume, that he had notice. (3) In the late case of *Phipson v. Kneller* (4), where it appeared, that the drawer, only a few days before the bill became due, stated to the holder, that he had no regular residence, but would call and inquire whether the bill had been paid by the acceptor, Lord Ellenborough held, that he thereby took upon himself the burthen of inquiry, and dispensed with proof of notice; here, it might be presumed, that he had got the necessary information by his own inquiry.

An acknowledgment by the drawer to the holder, that the bill would come back to him, or that it would not be paid by him (5), or a promise by the drawer to pay the bill, knowing of the failure at the time (6), will dispense with the proof of notice; in such cases, it must be presumed, that he had due notice of the dishonour, and proof of notice is unnecessary. Thus in a late case on a foreign bill, Lord Ellenborough held (7), that the drawer's promise to pay admitted his liability, it admitted the existence of every thing that was necessary to

(1) *Brown v. Massey*, 15 East, 221. *Blackhan v. Doren*, 2 Campb. 503.

(2) *Claridge v. Dalton*, 4 Maule & Selw. 251.

(3) See *Cory v. Scott*, 3 Barn. & Ald. 624, 625.

(4) 4 Campb. N.P.C. 285. 1 Stark. N.P.C. 116. S.C.

(5) *Brett v. Levett*, 13 East, 215.

(6) *Rogers v. Stephens*, 2 T. R.

714. 719. *Lundie v. Robertson*,

7 East, 251. *Brett v. Levett*, 15 East,

213. *Wood v. Brown*, 1 Starkie,

N.P.C. 217.

(7) *Gibbon v. Coggon*, 2 Campb.

188.

render him liable: when called upon for payment of the bill, he ought to have objected, that there was no protest, instead of which he promised to pay; it must therefore be presumed, that he had due notice, and that a protest was regularly drawn up by a notary. But when the promise to pay has been made under ignorance of those circumstances, which it is material for the defendant to know, it is not binding upon him; and the notice must be proved, or the defendant will be discharged by the laches of the holder. (1)

Indorsee v.  
drawer.

A bill is *prima facie* evidence of money lent by the payee to the drawer (2); so that if the plaintiff fail on the special count, he may recover on the common count for money lent, or for money had and received, without any proof of a consideration.

Money counts.

V. Fifthly, of the action by the indorsee against the drawer.

Action by  
indorsee  
against  
drawer.

The declaration in an action brought by the indorsee against the drawer, is similar to that in an action by the payee, containing only an allegation of the indorsement. The indorsee, therefore, in addition to the proof of the facts necessary to be proved in the former case, is to show his title by proving the first indorsement (3), and must also prove any other indorsements, which are stated, however unnecessarily, in the declaration. (4)

The indorsement of the payee must be proved, although the bill, so indorsed, was shown to the defendant after it became due, at which time the defendant did not object to the title of the holder; as, where he objected to pay on the ground of having drawn without consideration, but said no-

Indorsement.

(1) *Blesard v. Hirst*, 5 Burr. 2670. (3) *Smith v. Chester*, 1 T. R. 654.  
*Goodall v. Dolly*, 1 T. R. 712. 5 *Supra*, p. 14.  
*Maule & Selw.* 286. (4) *Supra*, p. 14.  
 (2) *Bayley on Bills*, 163. See  
*ante*, p. 12.

Indorsee v.  
drawer.

thing respecting the indorsement, Lord Ellenborough held, that this could not be considered as an admission of the handwriting of the indorser. (1)

Proof of drawing,  
&c.

It will be necessary also to prove the drawer's signature (2) — the presentment (3) — the drawee's refusal to accept, or to pay, as the case may be (4) — and lastly, a regular notice to the defendant of the dishonour of the bill, for the holder tacitly engages first to apply to the acceptor for payment, and on his failure only, to resort to the drawer or indorser. (5) Respecting each of these points so much has already been said (6), it is scarcely necessary to add any thing in this place. As to the notice of the dishonour of the bill, it may be communicated by any person who is a party to the instrument. (7)

When a person draws on his own account, knowing at the time that he has no effects in the hands of the drawee to answer the bill, he must know, that the bill will be dishonoured, and proof of notice of this dishonour is rendered unnecessary. This case has been before mentioned. (8) But if a bill is drawn, payable to the order of the drawer, for the accommodation of *A. B.*, and indorsed by the drawer to him, and by him indorsed to the plaintiff, then, although neither *A. B.* nor the drawer has any effects in the hands of the acceptor, the plaintiff will be bound to give notice of non-payment (9); the want of notice may be the greatest detriment to the drawer in this case, by preventing him from having recourse to the person in favour of whom he drew the bill. (10)

Competency  
of witness.

A prior indorser is competent to prove, that the defendant promised to pay the bill after it became due (11); and the

(1) *Duncan v. Scott*, 1 Campb. 101. And on the proof of notice, p. 21.

(2) *Supra*, p. 8.

(3) *Supra*, p. 28.

(4) *Supra*, p. 36.

(5) *Supra*, p. 33.

(6) As to proof of indorsements, see ante, p. 14. 20. As to proof of drawer's signature, see p. 8. As to proof of dishonour of bill, p. 33.

(7) *Wilson v. Swabey*, 1 Starkie, N. P. C. 34. See ante, p. 21.

(8) *Supra*, p. 39.

(9) *Cory v. Scott*, 3 Barn. & Ald.

619.

(10) *Ib.* p. 625.

(11) *Stevens v. Lynch*, 2 Campb. 332. 12 East, 38. S. C.

drawee is competent to prove, that he had no effects of the drawer in his hands when the bill was drawn. (1) The payee of an accommodation bill, who has indorsed it for a valuable consideration, is a competent witness for the plaintiff to prove the consideration; for although he would be liable to the plaintiff for the consideration, if the action fail, yet he would be equally liable to the defendant for money paid, in case it should succeed.

*Indorsee v. indorser.*

What the drawee states at the time of presentment, (as that the drawer had no effects in his hands,) is evidence in an action against the drawer; but what passes between the drawee and the holder, after a bill, which has not been regularly presented, has become due, is not admissible, since the drawee was no longer to be considered as the agent of the drawer. (2)

A bill is *prima facie* evidence of money had and received by the drawer to the use of the holder, and of money paid by the holder to the use of the drawer. (3) "The original contract between the drawer and payee is to pay to the payee and his assigns, and to the assigns of such assigns in infinitum. There is the same privity between the drawer and the last assignee as the first. The first assigns over that chose in action, which in its nature and by the express permission of law is assignable, with the same privileges and advantages that it had when he first received it." (4) In case of a variance, therefore, which would preclude the plaintiff from recovering on the special count, he may recover on these general counts.

*Money counts.*

VI. Sixthly, Of the action by the indorsee against the indorser.

*Action by indorsee against indorser.*

(1) *Staples v. Okines*, 1 Esp. N.P.C.

331. *Legge v. Thorpe*, 2 Campb. 310.

(2) *Prideaux v. Collier*, 2 Stark. N.P.C. 57.

(3) *Bayley on Bills*, 165.

(4) *Wilmot J.*, in *Edie v. East Ind.*

*Comp.*, 1 Black. 299.

Indorsee v.  
indorser.

The indorser of a bill is, with regard to the indorsee, in all respects in the situation of a new drawer. He is therefore liable to a subsequent indorsee, immediately on the non-acceptance of the drawee, although the time, for which the bill was drawn, has not yet elapsed. (1) And this being the situation of the indorser with respect to the indorsee, the rules and observations, which have been before made concerning the action by the indorsee against the drawer, will apply equally to this action against the indorser. The plaintiff must prove the defendant's signature (2), the necessary indorsements between him and the plaintiff (3), the presentment, the non-acceptance or non-payment (4), and the notice of such non-acceptance or non-payment regularly given to the defendant. (5)

Indorsement.

The defendant's indorsement admits the hand-writing of the drawer; and the indorser is liable, though the bill be forged. (6) It admits also the ability and signature of every antecedent party. (7) Antecedent indorsements, therefore, need not be proved, though stated unnecessarily in the declaration. (8) The rule, with respect to the proof of such indorsements, is different in the case of an action against the acceptor; because he undertakes to pay to the payee or his order, and the plaintiff's title must therefore be established through the payee. But the indorser is to be considered as a new drawer, drawing in favour of the subsequent indorsee, to whom he engages to pay on the failure of the original drawee or acceptor; and any prior indorsement is entirely unconnected with the engagement. Prior indorsements, therefore, need not be proved. But if there are intermediate indorsements, between the indorsement of the defendant and that to the plaintiff, it should seem that all such intermediate indorse-

(1) *Ballingalls v. Gloster*, 5 East, 481.

(2) See *supra*, p. 14.

(3) *Supra*, p. 20.

(4) *Supra*, p. 21. 36.

(5) *Supra*, p. 37.

(6) *Lambert v. Oakes*, 1 *Ld. Raym.*

443. 1 *Salk*, 127. *S. C. Supra*, p. 20.

(7) *Bayley on Bills*, p. 218.

(8) *Critchlow v. Parry*, 2 *Campb.* N. P. C. 182. *Chaters v. Bell*, 4 *Esp.* N. P. C. 210. *Lambert v. Pack*, 1 *Salk*, 127.

ments, as are stated in the declaration, ought to be regularly proved. However, an admission by the defendant, of his liability to the plaintiff through any intermediate indorsement, will dispense with proof of that indorsement. (1)

Indorsee v.  
indorser.

The plaintiff must prove a regular demand on the drawee or acceptor, or at least show that he has used all due diligence to get the money. (2) If he neglects, and the drawee becomes insolvent, the loss falls upon himself; if he is diligent, and the drawee refuses payment, his immediate remedy is against the indorser. (3) Proof of a demand on the drawer is not necessary (4); for it is not on the default of the drawer, that the indorser warrants to the indorsee; the indorsee does not trust to the credit of the original drawer; he may not know whether such a person exists, or where he lives, or whether his name may have been forged. The indorser is drawer to the indorsee, and is the person to whom the indorsee originally trusted, in case the drawee should not pay the money. (5) Upon the same principle, the circumstance of the drawer's not having any effects in the hands of the drawee, cannot affect the indorser's right to notice of the dishonour (6); this circumstance will dispense with notice, in an action against the drawer; but the indorsee has no concern with the accounts between the drawer and acceptor. It is not necessary, therefore, in the action against an indorser, to state an acceptance by the drawee; but if it is stated in the declaration, Lord Ellenborough has held, that it must be proved at the trial. (7)

Presentment  
to drawee.

The rule is, that the bill must be presented to the drawee at some time; but at what specific time, is not fixed. In the late case of *Goupy v. Harden* (8), (where the question was, in an action by the indorsee against the indorser, whether the

Time of pre-  
sentment.

(1) *Sidford v. Chambers*, 1 Stark. N. P. C. 526.

(2) See ante, p. 36. 37.

(3) 2 Burr. 675.

(4) *Bomley v. Frazier*, 1 Str. 441.  
*Heylyn v. Adamson*, 2 Burr. 670.

(5) By *Ld. Mansfield*, in 2 Burr. 675.

(6) *Wilkes v. Jacks, Penke*, N.P.C. 202. b.

(7) *Jones v. Morgan*, 2 Campb. 474.

(8) 7 Taunt. 159.

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indorser.

plaintiff had been guilty of neglect in sending a foreign bill, payable after sight, into circulation before acceptance, and in keeping it in circulation without acceptance, as long as the successive holders found convenient,) the Court of Common Pleas determined, that there had not been in this case any neglect on the part of the plaintiff. Lord Ch. Justice Gibbs, in giving his judgment, adopted the language of the Court in the case of *Muilman v. D'Eguino* (1), where a similar question arose; and Eyre Ch. J. on that occasion said, "There would be a great difficulty in saying at what time such a bill should be presented for acceptance. The courts have been very cautious in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance; and it seems to be more necessary to be cautious with respect to a foreign bill payable in that manner. I do not see how the courts can lay down any precise rule on the subject." And Heath J. says, "No rule can be laid down as to the time for presenting bills drawn payable at sight or a given time after." "I am therefore clearly of opinion, (concluded Chief Justice Gibbs,) that the parties were not guilty of laches in putting this bill into circulation, before it was presented for acceptance." And in the last case on this subject, that of *Fry v. Hill* (2), the Court of Common Pleas recognised this doctrine, and determined, that it is a question for the jury, whether there has been a default in not presenting the bill within a reasonable time.

Notice of  
dishonour.

Enough has been already said respecting the proof of non-acceptance or non-payment (3), and the notice of such non-acceptance or non-payment (4). An absolute promise to pay on the part of the indorser supersedes the necessity of the ordinary proof of presentment, and of notice of the default. (5) It is to be presumed *prima facie* from the promise, that the bill had been presented for payment in due time, and dishonoured, and that due notice had been given to the defend-

(1) 2 H. Bl. 565.

(2) 7 Taunt. 397.

(3) *Supra*, p. 21. 37.

(4) *Supra*, p. 21. 37.

(5) See ante, p. 39. *Lundie v.*

*Robertson*, 7 East, 231. The promise in this case was made some months after the bill was due. *Wood v. Brown*, 1 Starkie, N. P. C. 217.



ant. And whether the promise to pay were made to the plaintiff, or to any other person who held the note at the time, it is equally evidence, that the defendant was conscious of his liability to pay the note, which must be, because he had due notice of the dishonour. (1)

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indorser.

If the indorsee fail on the common count in consequence of a material variance, and, except for this defect, would be entitled to recover, he may recover against the party who indorsed the bill to him, on the common count for money lent; for the indorsement is *prima facie* evidence of money lent by the indorsee to his indorser. (2)

Common  
count.

(1) *Potter v. Rayworth*, 13 East, 417., by Lord Ellenborough.      (2) *Bayley on Bills*, p. 164. See ante, p. 28.

## CHAP. II.

### *Of Evidence in Assumpsit on Policies of Insurance.*

THE principal points, which suggest themselves in considering this subject, are, First, the proof of the policy of insurance, upon which the plaintiff's right of action is founded; Secondly, the plaintiff's interest in the subject-matter of insurance; Thirdly, the loss of the property insured.

First, as to the proof of the policy.

The original policy of insurance is the best evidence of the contract and undertaking on the part of the defendant; this, therefore, ought to be produced and proved. (1) If the policy is subscribed by a third person as the agent of the defendant, (in which case the plaintiff may declare upon it, as being signed by the defendant himself) (2), the authority of the agent must

Proof of  
policy.

(1) As to proof of written instruments, see vol. 1. part 2. ch. 8. s. 2.      (2) *Nicholson v. Croft*, 2 Burr. 1188.

regularly be proved; and this may be proved by the person who subscribed as agent, or by the power of attorney or other writing of the defendant, by which he was appointed: or it would be sufficient to show, that the defendant has recognized his act on this particular occasion, or that he has recognized him on several other occasions as his agent for subscribing policies. (1) The agent himself is competent to prove his authority; and though he should state, that he was appointed agent by a power of attorney, yet it scarcely seems necessary to produce the written authority, at least in the first instance; for the fact of his having been so appointed is more in the knowledge of the defendant than of the plaintiff; and the defendant, in answer to such proof of agency, may show, if he can, that the agent has exceeded his authority. (2)

Policies cannot be contradicted or varied by any antecedent written agreement of the parties, or by parol evidence of what passed at the time of effecting the policy. (3) The rule is universal, and applies to this, as to every other written contract.

Usage of merchants.

The usage of merchants, with reference to which the parties are supposed to contract, is frequently resorted to for explaining or defining the terms of a policy; for the terms, used in policies, very commonly acquire, by the well-known usage of trade, a peculiar sense distinct from the popular sense of the words. (4) However, proof of usage is not admissible to contradict the plain unequivocal language of a policy. (4)

(1) *Neal v. Irving*, 1 Esp. N.P.C. 61. Such a recognition, though not expressly stated in the report of this case, must be presumed. See *Courteen v. Touse*, 1 Campb. 43. n. As to proof of agency, in general, see vol. 1. p. 102.

(2) In *Johnson v. Mason*, 1 Esp. N.P.C. 89., where, in an action of replevin, the plaintiff claimed by a deed, which had been executed un-

der a power of attorney, Lord Kenyon held, that the power ought to be produced. The plaintiff here claimed as lessee of the person under whom the defendant made cognizance for rent in arrear.

(3) See vol. 1. part 2. ch. 10. s. 2.

(4) See vol. 1. part 2. ch. 10. s. 2. The cases on this subject are collected in the 2d ch. of Park's System of the Law of Insurance.

Secondly, as to the plaintiff's interest in the subject-matter of insurance.

Interest in property insured.

In an action on an insurance of goods and merchandise, the plaintiff avers in his declaration, that goods were laden on board to the amount of the sum insured, and that the person, for whom the insurance was effected, was interested to that amount; or in the case of an insurance of a ship, there is an averment of interest in the ship. The interest of the party, therefore, in the subject-matter of insurance, must be proved at the trial, as averred.

Bills of lading are frequently produced in evidence, to prove the property of the consignee in the goods specified. If the bill of lading be originally made for delivery to the consignee — or, being made for delivery to the consignor or assigns, or to order or assigns, if it be indorsed by the consignor to a third person by name — the person named has authority to dispose of the goods; and if the bill be made for delivery to the consignor or assigns, or to order or assigns, and be indorsed generally without designating any person, the holder of the instrument, in this latter case, has the same authority. (1) A bill of lading, signed by the master, directing the goods to be delivered to a consignee, and indorsed by the consignor, is an immediate transfer of all interest in the goods to the consignee: "it conveys the property upon a *bonâ fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery would do, if so intended." (2) And an indorsement by a factor, who has shipped the goods, for delivery to A. B. or order, (the bill of lading directing the delivery to order or to assigns,) is a transfer of the property; here, the factor, being in possession of the goods, purports to sell them *bonâ fide*; and the principal, who trusts his factor with the power to sell absolutely, is so far bound by his act. (3)

(1) As to the nature and forms of bills of lading, the reader is referred to Mr. Abbott's Treatise of the Law of Merchant Ships, last edit. p. 392. (2) Lord Ellenborough, in *Newsom v. Thornton*, 6 East, 41. (3) *Wright v. Campbell*, 4 Burr. 2047. 6 East, 41.

When a bill of lading, indorsed by the consignor, is produced in evidence, proof of the indorsement will be necessary. If the bill, directing the delivery to a consignee, is not indorsed by the consignor, it is still a transfer of the property in the goods to the consignee, and negotiable: and for the purpose of being received in evidence, requires only proof of the master's signature. If he is dead at the time of the trial, proof of the fact of his death and of his signature has been considered sufficient evidence of the interest in the consignee (1); and, if he is alive, proof of his signature will be equally sufficient for this purpose, though it will not be evidence of the shipping of the goods, as it would in the case of his death. If the master, who signed the bill of lading, and is since dead, has made a memorandum on the bill, that the contents of the boxes on board were unknown, it is scarcely necessary to observe, that such an instrument cannot be evidence of the quantity of the goods, or that the property was vested in the consignee. (2)

Bills of lading "for goods, merchandise, or effects to be exported," require a three-shilling stamp. (3) And bills of lading for goods and merchandise to be carried coastwise, (that is, from one port of Great Britain to another port,) are now subject to the same duty. (4)

Shipping of  
goods.

The shipping of the insured goods must also be proved. This fact admits of various kinds of proof. It may be proved by the master of the ship or the mate, or other person present at the time of the delivery. A bill of lading, signed by the master of the ship, and acknowledging the receipt of the goods there specified, will be evidence, after his death, of the shipment of the goods (5): for the deceased master charges himself by this instrument with the receipt of the goods; and upon this ground, from analogy to many

(1) *Haddow v. Parry*, 3 Taunt. 305.

(2) *Ib.* 3 Taunt. 305.

(3) *St.* 48 G. 3. c. 149. sch. pt. 1.

(4) *St.* 55 G. 3. c. 184: sched.

(5) *Haddow v. Parry*, 5 Taunt. 303. The bill of lading seems, according to the report, not to have been indorsed.

other cases of a similar nature (1), the instrument has been considered admissible evidence on the part of the consignee against third persons. If the master is not deceased at the time of the trial, the bill of lading seems not to be evidence of the shipment of the goods on board (2); though it would be evidence of the transfer of the property to the consignee. The shipment of the goods has been sometimes proved by certain official documents: as, in the case of *Johnson v. Ward* (3), where a copy of an official paper, containing an account of the cargo of a ship, (the original having been made in pursuance of an act of parliament by an officer of the customs, and lodged there as an official document,) was admitted as proof, that the insured property was put on board.

A bill of lading, though the most usual proof of property in the goods shipped, is not the only proof; the owner may convey his interest in any other form that is effectual for the purposes of sale. The shipment of goods, on account of the purchaser, according to the agreement or course of dealings between the parties, is analogous to a delivery to a land-carrier, and operates as an actual delivery to the purchaser. (4)

When a ship is the subject-matter of insurance, the interest of the party may be shewn by proving his possession of the ship, or the possession of those to whom he has committed it, or that he has directed the loading of the ship and purchased the stores, or paid the persons employed on board. (5) Such acts are presumptive evidence of ownership, and sufficient in the first instance to entitle the plaintiff to recover, without the aid of any documentary evidence or title-deeds. The most common and ordinary proof is the evidence

Property in ship.

1. Possession.

(1) See vol. 1. part 2. ch. 7. sect. 7. 14 East, 233. 4 Taunt. 657. Possession of a ship under a transfer, though the transfer is void for non-compliance with the register-acts, is a sufficient title in trover. *Sutton v. Buck*, 2 Taunt. 302.  
 (2) See vol. 1.  
 (3) 6 Esp. 47. The official paper, in this case, was proved to have gone with the ship.  
 (4) See Index, title, Carrier.  
 (5) *Amery v. Rogers*, 1 Esp. N.P.C. 206. *Thomas v. Foyle*, 5 Esp. 88.

of the captain, stating that the persons, who are represented in the declaration as owners, employed him in that character; and though it should afterwards appear, on his cross-examination, that they were entitled to the ownership under a bill of sale, yet this will not make it necessary for the plaintiff to produce that document, or to produce the ship's register, or to give, in the first instance, any ulterior proof of their property. (1) "The mere fact of possession by them, as owners, said Lord Ellenborough in the case of *Robertson v. French*, above cited (2), is sufficient *prima facie* evidence of ownership, without the aid of any documentary proof or title-deeds on the subject, until such further evidence should be rendered necessary in support of the *prima facie* case of ownership, in consequence of the adduction of some contrary proof on the other side. No such contrary proof was, however, in this case given on the part of the defendant: for the prior register in the name of J. S. as owner in 1792, and a subsequent register to the same person upon a sale in 1802, under a decree of the Court of Vice-Admiralty, (and which were given in evidence by the defendant,) were perfectly consistent with a title in other persons in the mean time, agreeable to the averment in the declaration." But if the defendant, in answer to such *prima facie* evidence, prove by the registry, that the ship was registered, as belonging to another person, at the time when the insurance was made, the plaintiff cannot recover. (3)

Proof of possession, then, without the production of the register, is *prima facie* evidence of an interest in the ship, as it would have been before the register-acts. Indeed, any of the proofs of ownership, which would have been admissible before the register-acts, will now also be equally admissible. But where the additional proof of registry is required, in order to make the other evidence admissible (4), (as it clearly is,

(1) *Robertson v. French*, 4 East, 130. 5 Esp. 88. *Marsh v. Robinson*, 4 Esp. 99.

(2) 4 East, 137.

(3) *Marsh v. Robinson*, 4 Esp. 99. *Teed v. Martin*, 4 Campb. 90.

(4) See 4 Taunt. 657.

where the property is claimed under a bill of sale or other writing,) the registration must be regularly proved.

If the plaintiff claim the property in the ship under a bill of sale, or other instrument in writing, such written instrument ought to be produced; and in those cases, where the registry-acts require the ship to be registered, the registration must be proved. (1) In an action, therefore, on a policy of insurance on freight, where the interest in a ship and its earnings was alleged to be in four persons, who were partners in trade, and had jointly purchased and paid for the ship, but had caused her to be registered in the names of two of them alone, it was decided that the action was not maintainable (2); for it could only be maintained on the proof of ownership, and the plaintiffs here failed in proving their title, since the bill of sale, under which they claimed, did not truly recite the certificate of the registry conformably with the provisions of the statute, and was therefore absolutely void. The purchase of a ship in a foreign country has been proved by a copy of the bill of sale, issued by a public officer, whose duty it was to record the original, and authenticate the copy. (3)

The registration, though necessary to complete a title, is not evidence of the transaction of sale; the register is not kept for the sake either of those who made a transfer, or for those who accepted it, but for purposes of public policy. (4) A ship's register is not a public instrument; it is an instrument of a private nature. (5) "For every purpose," said Mr. Justice Le Blanc, in the case of *Tinkler v. Walpole* (6), "for which the statutes have required these public documents to be made, they are evidence by force of the statutes; but when produced for any other purpose, they are stripped of legislative authority, and must be evidence, or not, according

(1) As to the registry on transfer of ships, see Mr Abbott's *Treatise on the Law of Merchant Ships*, and Holt's *Treatise on the same subject*.

(2) *Camden v. Anderson*, 5 T. R. 709.

(3) *Woodward v. Larking*, 5 Esp. 286., before Lord Eldon.

(4) *Fraser v. Hopkins*, 2 Taunt. 6.

(5) 4 Taunt. 657.

(6) 14 East, 252.

to the general principles of evidence." In the late case of *Pirie v. Anderson* (1), which was an action on a policy of insurance effected by the plaintiff as agent, the original register of the ship was produced, in order to prove the interest in several joint-owners, as stated in the declaration; the register purported to be made upon the oaths of those persons, as the sole owners of the ship; the affidavit, upon which this registry purported to have been made, was not proved; one of the parties had given instructions for inserting the names of all, as owners, in the bond required by the register-act; there was no evidence of their possession, or that they had exercised any act of ownership: under these circumstances the Court of Common Pleas determined, that the register was not evidence of the ownership in the vessel. "It was strongly urged for the defendant," said the Chief Justice, "that because the title cannot be complete without the register, therefore the register shall be *prima facie* evidence of the title; but that does not follow. If the Legislature makes an act necessary to complete a title, it does not thereby make that act alone a proof of the title; if such were the rule of law, a man might make for himself a title to any thing."

If, in the last-cited case of *Pirie v. Anderson*, the affidavit of all the parties had been proved, and it had appeared that the registration was actually made on the oaths of the persons described as interested, still the register would not have been of itself evidence of their joint-interest: for the fact of their saying, that they have title, (whether accompanied by an oath or not,) is not evidence of their title. (2) "If a person sign the register, it is evidence *against* him; but it can amount to no more than a declaration that he is owner, which a man cannot convert into evidence of his own title. If the register

(1) 4 Taunt. 653. Nor is the registration evidence against a defendant, to charge him as owner, without proof of its being acknowledged by him. *Tinkler v. Walpole*, 14 East, 226., and other cases cited in vol. 1. part 2. ch. 6. But if a person procures the entry of registration to be

made, or adopts it as his own, it is certainly evidence, *against* him, of his liability as owner.

(2) See 4 Taunt. 655. And as to the dictum in 14 East, 223., which seems contrary to this, see 4 Taunt. 657.



were recognised as a public document to prove the ownership, it would be evidence as well against, as for, all the persons, whose names appear upon it. However, it must be considered as a private instrument only; and therefore, although it may be evidence as an acknowledgment against the persons who sign it, it cannot be evidence in their favour, amounting to nothing more than their own declaration." (1) The registration may be indispensably necessary to complete the title on a transfer of the property in a ship, but it is not of itself evidence of title.

A material variance between the interest, averred in the declaration, and that proved at the trial, is a ground of nonsuit. The allegation, on whose account, and for whose benefit the policy was made, is a material allegation, and the statement ought to be strictly conformable with the fact. Thus, where the interest was alleged to be in a single person, and the policy purported to be made on his account whereas in fact several were jointly interested, and the policy was made on their joint account, the variance was held to be fatal. (2) Lord Ellenborough, in delivering the judgment of the Court in this case, said, "The underwriters are entitled to have it stated truly upon the record, whose interest the policy was to protect. Although an action upon a policy may be brought in the name of the person who effected it, though he is not the person actually interested; yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are admissible in evidence against the plaintiff, and what would be a defence against them is, in many instances, a defence against the plaintiff: and with a view to apprise the underwriter, whose declaration it may be material for him to be prepared to prove, and whose case he is to meet, he ought to be truly informed by the record,

Proof of interest as averred.

(1) By Lord Ellenborough, *Flower v. Young*, 3 Campb. 240. The register was here offered as evidence, in support of a plea of abatement, that other persons were jointly interested with the defendant.

(2) *Bell v. Ansley*, 16 East, 141. *Cohen v. Hannam*, 5 Taunt. 101. See *Carruthers v. Sheddon*, 1 Marshall, 416. 6 Taunt. 14. S.C.

for whose interest, and on whose behalf, the policy was made. It certainly is material also, in point of public policy and convenience, that a disclosure of the true interest, meant to be covered by the policy, should be correctly made, in order to exclude the property of enemies from the benefit of British insurance." The rule, indeed, is general, that, in an action on a contract, the contracting parties ought to be named in the declaration; if it were otherwise, the defendant might be surprised by having one of the parties called as witness against him; or, what would be still worse, one of them might sit undiscovered among the jury. (1)

An averment, of there being an interest at the time of effecting a policy, is immaterial, and need not be proved; hence although there is such an allegation, it will be sufficient to prove, that the plaintiff was interested at the commencement of the risk. (2) On the subject of variances, two other cases may here be mentioned; the case of *Peppin v. Solomons* (3), and that of *Abitbol v. Bristow*. (4) In the former case, where the declaration stated, that the ship sailed *after* the making of the policy, and the sailing was proved to have been *before*, the Court thought the variance immaterial. In the latter case, the declaration averred, that, after the loading of the goods on board, on a certain day, the ship, with the goods on board, departed, and set sail on her intended voyage, and afterwards, and while the ship was in the course of her voyage, they were destroyed by perils of the sea: the evidence was, that before the ship had half her cargo on board, she was driven from her moorings by bad weather, and lost. The Chief Justice, after adverting to the cases of *Peppin v. Solomons* and *Rhind v. Wilkinson*, above cited, added: "This is a different case. This is a policy at and from a certain place abroad, and embraces as well losses happening at that place, as losses occurring while the ship might be on her voyage home; but the two cases demand very different consideration. While the ship is on her

(1) 5 Taunt. 108.

(3) 5 T. R. 496. 6 Taunt. 465.

(2) *Rhind v. Wilkinson*, 2 Taunt.

(4) 6 Taunt. 464.

237. 6 Taunt. 465.

voyage home, she must be fully rigged, victualled, manned, and equipped; while she is at the place abroad, she need have no other men on board, than such as are necessary to prevent fire or the like accidents; no sails, provisions, or equipment are necessary. The averment, therefore, of a loss on the voyage would lead the underwriter to inquire, whether her state at the time of the loss was adapted to such a voyage. Therefore, though both losses are within the policy, each requires a very different state of facts, and a different declaration." The Court determined, that the plaintiff had not proved the averments, and a nonsuit was entered.

Thirdly, as to the loss of the insured property.

Proof of loss,  
as averred.

The loss must be substantially proved, as averred. A plaintiff, who declares for a loss by capture, cannot recover, if the ship, after the capture, was restored, so as to be in a condition to pursue the voyage insured, and was afterwards lost in another voyage; for the loss cannot be said to have been occasioned by the capture. (1) So, an averment of loss, from seizure in a hostile manner, by enemies unknown, is not supported by proof, that the goods were seized by the government of a foreign country, on the ground of being about to be illegally imported. (2) A payment into court by the defendant, of so much *per cent.* on a valued policy, is clearly not an admission of a total loss. (3)

An entry in the book kept at Lloyd's, stating the capture of a ship, is evidence of that fact, though it is not sufficient evidence of notice to the defendant, so as to make him liable on a policy of insurance, by which it was agreed, that the loss should be adjusted within a certain time after the advice of the capture. (4) The sentence of a foreign court of admiralty is not evidence of a capture: but, after independent proof of the

Proof of capture.

(1) *Kulen Kemp v. Vigne*, 1 T. R. 304.

(2) *Matthie v. Potts*, 3 Bos. & Pull. 23.

(3) *Rucker v. Palsgrave*, 1 Taunt. 419.

(4) *Abel v. Potts*, 3 Esp. 242.

capture, it will be evidence of the facts, on which the condemnation proceeded. (1)

**Loss of ship.**

There is no fixed rule of law for ascertaining at what precise period a ship, which has been for some time missing and unheard of, shall be considered as lost. This must vary with the circumstances of each particular case. On a short voyage the presumption of loss must naturally arise sooner than upon one more distant. All that can be necessary in such inquiries is the best proof, that the nature of the case admits. (2) A practice, it is said, has prevailed among insurers, that a ship shall be deemed lost if not heard of for six months after her departure for any part of Europe, or after the time of the latest intelligence; and in twelve months, if for a greater distance. (3) The plaintiff need not shew, that the ship has not since been heard of at her place of destination; but it will be sufficient to prove, that no information has been received in this country since her departure. (4)

**Proof of sailing.**

In the case of a supposed loss at sea, there must be some evidence of the ship's sailing upon the voyage mentioned in the policy. For this purpose, proof of a particular destination by charter-party would be a ground for presuming, that it was the chartered voyage, on which the ship sailed; or the proof of clearing out for a particular port would afford a presumption, that she set sail for that port, when she dropped from her moorings. (5) In the case of *Cohen v. Hinckley* (6), where it was necessary to prove the sailing of a ship from Portsmouth to Quebec, the counsel for the plaintiff offered in evidence the convoy bond, executed at the custom-house by the captain and by the plaintiff as owner, at the foot of which there was a memorandum of "Convoy bond for Quebec;" and an officer of

(1) *Marshall v. Parker*, 2 Campb. 70. As to the effect of judgments of admiralty courts, see vol. 1. part 2. ch. 3. sect. 2.

(2) *Green v. Brown*, 2 Str. 1199. *Newby v. Read*, Park. Insur. 106. *Houstman v. Thornton*, Holt, N.P.C. 243.

(5) Park. Insur. 107.

(4) *Twemlow v. Oswin*, 2 Campb. 85.

(5) By *Ld. Ellenborough*, 2 Campb. 52.

(6) 2 Campb. 51.

the customs further proved, that a certificate and other papers for a voyage to Quebec would, in the regular course of office, be delivered to the captain before he sailed: this was held sufficient proof, that the voyage, on which the ship sailed, was the voyage insured. And a licence, to carry a cargo to the place of destination mentioned in the policy, is evidence to the same effect. (1)

When a voyage, which was illegal in itself, has been legalized by a licence, the licence must be produced. The original document is the best evidence. If a licence, granted by a competent authority in a foreign country, has been lost, and the loss is satisfactorily proved (2), parol evidence of its contents will be received. But if the licence has been granted by the government of this country, parol evidence is not admissible to prove its contents, though the licence be lost; for there must be some register of it preserved at the office of the secretary of state, (on whom the stat. 48 G. 3. c. 126. s. 2. throws the office of signing licences \*,) and that register would be better than parol evidence; and, even if the licence were under the sign manual, still some register of it would be preserved, which ought to be resorted to in preference to mere parol evidence. (3) By the stat. of 48 G. 3., above mentioned, a duplicate of the order of council, which authorises the grant of the licence, is to be annexed to the licence; and, if the licence is lost, examined copies of the order in council from the council-books, and of the licence in the office of the secretary of state, ought to be produced as the best secondary evidence. (4)

Proof of  
licence.

(1) *Marshall v. Parker*, 2 Campb. 69.

(3) *Rhind v. Wilkinson*, 2 Taunt. 243.

(2) *Kensington v. Inglis, & East*, 273.

(4) *Eyre v. Palgrave*, 2 Campb. 606.

\* This statute enacts, that it shall be lawful for his Majesty, by order of council, or by his royal proclamation, to direct that all such licences, as, by virtue of any act of parliament or otherwise, his Majesty may lawfully grant under his sign manual, may be granted by one of the principal secretaries of state, in pursuance of an order of council, specially authorising the grants of such licence, a duplicate of which order shall in all cases be annexed to such licence.

Proof of partial loss.

The plaintiff, though he declares as for a total loss, and proves only a partial loss, may recover to the extent of his proof. As to the loss being a total or a partial loss, that is a question, more applicable to the *quantum* of the damages, than to the ground of action; the ground of the action is the same, whichever the loss may be; both are perils within the policy. (1) The plaintiff may recover less damages than he demands in his declaration, though he cannot recover more.

Proof of salvage.

In an action upon an insurance of goods on board of a ship, if the declaration state, that the ship was sunk, whereby the goods were spoiled, and it appear that some of the goods were saved, the plaintiff may give evidence of the expense of salvage, though not specifically averred (2): for it is a consequence of the damage stated in the declaration, and the defendant has sufficient notice as to the nature of the loss. Salvage on the recapture of a ship must be proved by producing the proceedings of the admiralty court, which have ascertained the amount (3): the act of parliament 43 G. 3. c. 160. s. 40. expressly requiring, in all cases of capture and recapture, that some proceedings should be had in the admiralty court, to ascertain, what shall be the amount of salvage. The amount, therefore, of partial loss, claimed of the underwriter, must depend upon the proceedings of that court. Where, indeed, a ship could not be carried into an admiralty court, the impossibility might excuse the production of the proceedings, which would be required in ordinary cases. But the general rule is, that where the plaintiff seeks to recover in consequence of the judgment of a court, he must produce the judgment.

Captain's protest.

A protest by the captain of the ship is not admissible in chief as evidence of the facts there stated. Nor can it be received as an admission of those facts, merely on the ground of

(1) *Gardiner v. Crossdale*, 2 Burr. 904.

(2) *Cary v. King*, Rep. temp. Hard. 304.

(3) *Thellusson v. Shedden*, 2 New Rep. 229.

having been shown by the broker to the defendant, the underwriter. (1) If the protest has been adopted by the plaintiff as his own statement, it will of course be evidence against him, on the footing of an admission; or it may be admitted in evidence for the purpose of contradicting the statement of the captain, and so to discredit his testimony.

The principal facts, to be proved on the part of the plaintiff, having been considered, it may be convenient to mention, in this place, a few of the several grounds of defence, and to treat shortly of the evidence applicable to each.

Evidence for defendant.

The defendant, under the general plea of non-assumpsit, may prove any thing that will have the effect of rendering the policy void, such as, misrepresentation or concealment of circumstances, by which the underwriter may have been deceived or misled as to the nature of the risk. With respect to this, the evidence of underwriters, as to the material nature of the circumstances, and the effect which they would have upon the premium, is not admissible. It is the province of a jury, and not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of mere opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected. (2)

Misrepresentation.

In an action against a second or other subsequent underwriter, it has been the practice to admit evidence of representations made to the first underwriter, on the ground that the others give credit to the representations made to the first, and have faith in his judgment. (3) However, the rule has never

Proof of representations to the first underwriter.

(1) *Senat v. Porter*, 7 T. R. 158. *Christian v. Coombe*, 2 Esp. 489.

(2) By *Gibbs C. J.* *Durrell v. Bederley*, 1 Holt, N. P. C. 286. See *Barthou v. Loughman*, *contra*, by *Holroyd J.*, 2 Starkie, 258., stated in vol. 1.

(3) *Pawson v. Watson*, Cowp. 789. 3 East, 573. *Stackpole v. Simon*, MS. case, reported in *Park's System of Insurance*, 648. last edit.

been extended to any underwriter except the first; and the admissibility of the representations, even in that instance, has been thought to be founded more on precedent than on reason. (1) Lord Ellenborough has said, upon this subject (2), "Whenever the question comes distinctly before the court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark, that the proposition is to be received with great qualification. It may depend upon the time and circumstances, under which that communication was made; but on the mere naked unaccompanied fact of one name standing first upon the policy, I should not hold, that a communication, made to him, was virtually made to all the subsequent underwriters. But the question is of such a magnitude, that, if it should arise, I should direct it to be put on the record, in order that it might be submitted to the consideration of all the Judges."

In the case of *Marsden v. Reid* (3), as the name of the underwriter, to whom the broker had made certain representations concerning the ship, stood in the policy after the name of the defendant, it was proposed, on the part of the defendant, to give in evidence a separate slip of paper, which, as it was said, contained the names of the underwriters in the true order, in which they had been originally applied to, and in which they had agreed to sign, and this order was different from that on the policy. This paper was tendered in evidence, to show the order, in which the underwriters had in truth engaged, for the purpose of introducing evidence of a false representation made to the first underwriter. But Lord Ellenborough C. J. at the trial, and the Court afterwards, upon the discussion of the rule for setting aside the verdict, were of opinion, that the paper in question could not be received in evidence for this purpose, on account of the want of a stamp; the effect of the evidence being to show, through the medium of a writing, that the contract, entered into between these

(1) See *Brine v. Featherstone*,  
4 Taunt. 871.

(2) *Forrester v. Pigou*, 1 Maule  
& Selw. 13. And see 3 East, 573.

(3) 3 East, 573.



parties, was different from that which it appeared to be upon the face of the policy itself, inasmuch as the true contract was to be evidenced by the order, in which the underwriters had engaged, as appeared by the paper produced.

Another ground of defence is, that the ship insured was not sea-worthy at the commencement of the risk; for the sea-worthiness is an implied condition or warranty in every policy. If the inability of the ship to perform the voyage becomes evident immediately after leaving the port, or in a short time after the risk commences, without any apparent cause of injury, the presumption is, that this inability has arisen from causes, existing before her setting sail on her intended voyage, and that the ship was not then sea-worthy: and the burthen of proof, in such a case, is thrown upon the assured, to show, that the inability arose from causes subsequent to the commencement of the voyage. (1) On the question of sea-worthiness, ship-builders may be admitted to state their opinion, on examining a survey taken by others, although taken in their absence; the subject being a matter of skill and science. (2)

Other grounds of defence, which may be proved under the general issue, are, that the voyage, the trading, or insurance, were prohibited by the laws of the country; or that the ship deviated before the loss, without any necessity or reasonable cause, from the regular course of the insured voyage; for this is an implied condition, that the ship shall pursue the most direct course from the point of starting to the point of destination.

The defendant may also prove, under the general issue, that the party insured has not complied with a warranty contained in the policy. (3) In order to prove a warranty, that a ship insured was of a particular nation, proof of her

Sea-worthiness.

Non-compliance with warranty.

(1) *Watson v. Clark*, 1 Dow. 356.

(2) *Beckwith v. Sydebotham*, 1 Campb. 117. See vol. i. part 1. ch. 8.

(3) As to effect of sentences of courts of admiralty in falsifying warranties, see vol. i. part 2. ch. 3. s. 2.

carrying the flag of that nation, at times when she was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign part, is *prima facie* evidence of the truth of the fact warranted. (1) The circumstance of her carrying such colours merely at the time of capture would have very little weight, as in the moment of danger any strange flag might be hoisted for the purpose of deception: it is the fact of her carrying them at other times, when she was in a state of security, that gives weight and importance to the evidence.

#### Witnesses.

An underwriter is not an incompetent witness, in an action against another underwriter, merely from the circumstance of his having subscribed his name on the same policy. (2) If he has entered into a consolidation rule, he has an interest in the result; and that will disqualify him as a witness. Or if he has chosen to pay his debt beforehand, upon a condition to be determined by the event of the suit, he becomes as much interested in the event, as if he were a party to a consolidation rule. (3) In an action on a policy of insurance on goods, the owner of the vessel, on board of which the goods were put, is not a competent witness for the plaintiff, to prove the sea-worthiness of the ship (4); for he will be liable to an action at the suit of the plaintiff, if the plaintiff fail, and the verdict would be evidence against him in such action as to the *quantum* of damages. For the same reason, the captain of the vessel is not a competent witness for the defendant, the underwriter, to disprove the charge of barratry. (5) When the only question at issue relates to the original destination of the ship, the captain is competent to give evidence on that point, though he is part-owner of the ship. (6)

(1) *Arcangelo v. Thompson*, as *Green v. N.R. Comp.* 4 T.R. 589., 2 Campb. 620. and other cases cited in vol. i. p. 57.

(2) *Bent v. Baker*, 3 T. R. 27. See vol. i. p. 48.

(3) 1 Maule & Selw. 14.

(4) *Rotheroe v. Elton*, Peake N. P. C. 84. Upon the same principle

(5) *Bird v. Thompson*, 1 Esp. N. P. C. 559.

(6) *De Symonds v. De la Cour*, 2 New Rep. 574. See vol. i. p. 50.

## CHAP. III.

*Of Written Agreements required by the Statute of  
Frauds.*

**A**S the statute of frauds requires a written agreement, or some memorandum in a great variety of cases, where writing would not have been necessary by the rules of the common law, it may be convenient to refer to the provisions of that statute, before we proceed further in treating of actions of assumpsit on contracts. An inquiry, therefore, into those cases, in which some writing or memorandum is required by the statute of frauds, forms the subject of the present chapter.

The three first sections of this statute (1) relate to interests created in real property; the fourth section relates to several kinds of agreements; the fifth section, to wills and devises of real property; the seventeenth, to contracts for the sale of goods. The first section declares the legal effect of leases, which are not in writing. It enacts, "that all leases, estates, Sect. 1. interests of freehold or terms of years, or any uncertain interests, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or [by] their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding."

Then the second section makes the following exception of Sect. 2. certain leases: "Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent, reserved to the landlord during such term, shall

(1) St. 29. C. 2. c. 3.

amount unto two-thirds at least of the full improved value of the thing demised."

**Sect. 8.** The third section enacts, "that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or [by] their agents thereunto lawfully authorised by writing, or by act and operation of law."

**Construction  
of sect. 1. & 2.**

The meaning of the first and second sections appears to be, that such leases of messuages, manors, lands, &c., as do not exceed the term of three years from the making thereof, and upon which the rent, reserved to the landlord during the term, amounts to two-thirds at least of the full improved value of the thing demised, are valid without writing (1), provided that no writing were necessary before the statute of frauds; but that all leases of messuages, lands, &c., which exceed the term of three years from the making thereof, (whatever may be the amount of the rent reserved,) or upon which, if they do not exceed that term, less than the two-thirds of the full improved value is reserved, shall have the force and effect only of leases or estates at will, unless put in writing and signed, as the statute directs; and further, that all other interests, created without writing, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, whether they are interests of freehold or terms of years, or for an uncertain duration, can only have the same effect, namely, of leases or estates at will. (2) The first section, as it has been justly observed (3), seems to embrace interests of every description, while the exception in the second section relates only to leases of a particular description. A

(1) *Ryley v. Hicks*, 2. Str. 651.

(2) By Lee C. J. and Denison J., in *Wood v. Lake*, Say. 4.

(3) See Sugden's *Treatise on the Law of Vendors and Purchasers*,

4th edit. 56. 59.; and the observations there made on a part of the judgment in the case of *Crosby v. Wadsworth*, 6 East, 610.

mere easement in lands or tenements, &c. is not an interest within the provision of the first section. Agreements, therefore, for the liberty of using a way over another person's field, or for stacking coals upon his close (1)\*, or for nailing the frame-work of a skylight against the wall of his house (2), are valid without writing.

Sect. 1. & 2.

Leases by parol, not within the exception before mentioned, are not available as to the duration of the interest; for the statute enacts, that they shall have the force and effect of leases or estates at will only; but still they may in some cases be applied to regulate the terms, on which the tenancy subsists in other respects, as, for example, the amount

(1) *Wood v. Lake*, Say. 3.

(2) *Winter v. Brockwell*, 8 East, 310. n (a)

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\* In the case of *Wood v. Lake*, the licence was for seven years: and a material part of the agreement was, that the party, who had the liberty of stacking, had also the sole use of the close. The question was, in an action on the case for obstructing the plaintiff, whether the agreement was good for seven years: and the Court, after taking time to consider, held that it was good. On the argument, Lee C. J. and Denison J. were of opinion, that the agreement was only for an easement and not for an interest in the land, and that it did not amount to a lease, on the authority of the case of *Webb v. Paternoster*, (Palm. 71. S. C. 2 Roll. Rep. 143. Pop. 161.), where it was laid down, that the grant of a licence to stack hay upon land did not amount to a lease of the land. Wright J. was absent; and Foster J. at first doubted, whether the words in the statute, "*any uncertain interest in land*," would not extend to this agreement; but the other Judges considered these words as relating only to interests uncertain as to the time of their duration. The case of *Webb v. Paternoster*, which was before the statute of frauds, will be found on examination not to support the case of *Wood v. Lake* to its whole extent. The simple question there was, whether a person, who had a licence to stack his hay on the close of A. B., until he could conveniently sell it, might maintain an action against the defendant, who subsequently to the licence had taken a lease of the close, and whose cattle had consumed the plaintiff's hay; the Court gave judgment for the defendant, on the ground, that the plaintiff ought to have removed his hay within a reasonable time, which he had not done. With respect to the point, whether the licence had the effect of a lease, it does not appear from the report in Palmer to have been laid down either the one way or the other: but two of the Judges are expressly said to have been of opinion, that it was an interest charging the land, and that the plaintiff had an authority coupled with an interest. However, there appears to be an obvious distinction between the two cases in this respect, that in the case of *Wood v. Lake* the party had not only the liberty of stacking upon the close, but had also the sole use of that part of the close; and this distinction seems not to have been noticed by the Court.

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of the rent, or the time of the year when the tenant is to quit. In the case therefore of Doe on the demise of Rigge against Bell (1), where a tenant, who entered upon the premises on Lady-day under a parol lease for seven years, and was to quit at Candlemas, held over, after receiving a notice to quit on Lady-day, the Court of King's Bench were of opinion, that the notice was irregular, and that the tenancy could only be determined at Candlemas, which was the time for quitting fixed by the agreement. And though the statute, after enacting "that such leases shall have the force and effect of leases or estates at will," further enacts, "that they shall not either in law or equity be deemed or taken to have any other or greater force or effect; yet these words have been understood to mean, that a parol lease, exceeding three years, should not operate as a term, but that a holding under such a lease will now operate as a tenancy from year to year; because that is now construed to enure as a tenancy from year to year, which was then considered as a tenancy at will. (2)

**Construction  
of sect. 5.**

With respect to the third section, concerning assignments or surrenders, it is scarcely necessary to observe, that where a deed was requisite, in order to perfect a surrender, before this statute, a deed is still required; and in cases where a surrender might have been completed by mere parol, a note in writing, signed as the act directs, will now be sufficient. It has been determined, under this section, that a lease for years cannot be surrendered by a cancelling of the indenture; for the intent of the statute was to put an end to the practice, which then prevailed, of transferring interests in land by signs, symbols, and mere parol. (3)

In the case of a surrender "by act and operation of law," no deed or written memorandum will be necessary. An acceptance of a new lease by a lessee operates in law as a surrender of the former lease; the second lease being in writing, the transaction is of equal notoriety with a surrender in

(1) 5 T. R. 471.

(2) *Ld. Kenyon C. J. in Clayton v. Blakey*, 8 T. R. 5.(3) *Magennis v. Macculloch*, Gilb. Eq. C. 235. 6 East, 101.

writing. (1) If B., tenant from year to year, underlet the premises to C., and the landlord afterwards accept C. as his tenant with the assent of B., this also is a surrender of B.'s interest in the premises, by operation of law; so that the landlord has no longer any claim for subsequent rent against B. (2)

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Although taking a new lease of premises, which have been already demised, will in many cases operate as a surrender in law of the first lease; yet a recital in the second lease, that it was granted partly in consideration of the surrender of a former lease, (the instrument not purporting to be of itself a surrender,) is not a surrender by deed or note in writing, within the meaning of the statute. (3)

The language of the third section corresponds as nearly as possible with that of the first, comprehending all leases and interests in the subject-matters specified, whether for a longer or shorter term than three years; and it is not followed, as that section is, by a clause excepting leases of a particular description. It must be obvious, therefore, upon the plain construction of the act, that although leases, reserving a rent not less than two-thirds of the improved value, may be created by parol for a term not exceeding three years, yet that such leases cannot be assigned (4), or surrendered by parol. (5)

The fourth section of this statute enacts, that no action shall be brought, whereby to charge any executor or administrator upon any special promise to answer damages out of his own

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(1) *Magennis v. Macculloch*, Gilb. Eq. C. 235. 6 East, 101.

(2) *Thomas v. Cook*, 2 Barn. & Ald. 119. *Stone v. Whiting*, 2 Starkie, N. P. C. 235. *Remnant v. Bremridge*, 2 Moore, C. P. 94.

(3) *Roe dem. Berkeley, v. Abp. of York*, 6 East, 86.

(4) *Botting v. Martin*, 1 Campb. 317.

(5) *Mollett v. Brayne*, 2 Campb. 105. See *Whitehead v. Clifford*,

5 Taunt. 518. In this case the Court of Common Pleas held, that, if a landlord accept from his tenant, in the middle of a quarter, the key of the demised house, under a parol agreement, that the tenant should no longer occupy, and that the rent should cease, he cannot recover rent for any subsequent time, in an action for use and occupation.

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estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or [of] any interest in or concerning them; or upon any agreement, that is not to be performed within the space of one year from the making thereof; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

This section is not to be understood as giving validity to agreements, which would not be valid by the rules of common law; it leaves them to be judged of, with respect to all essential circumstances, (such as the consideration, the ability of the parties to contract, &c.) precisely according to the same rules as before the statute; it does not enact, that, when the agreement is in writing, the party must at all events be liable, but that the party shall not be liable to an action in certain cases, unless a written agreement be proved. (1) Nor, if the agreement is in writing, will it be necessary so to state it in the declaration; in which respect the statute has not made any alteration. (2) But where the defendant, in bar of the plaintiff's right of action, pleads such an agreement as cannot be the subject of a suit unless in writing, (as, if he were to plead, in an action of *assumpsit*, an accord to accept payment by another in satisfaction,) there he ought to plead it to be in writing, that it may appear to the Court, that an action will lie upon it; for he ought not to be allowed to take away the plaintiff's action, without giving him a complete remedy upon the agreement pleaded. (3)

(1) *Rann v. Hughes*, 7 T. R. 350. (a) *Barrell v. Trussell*, 4 Taunt. 121.

(2) *Com. Dig. tit. Action on Assumpsit*, (F. 3.)

(3) *Case v. Barber*, Raym. 450. 2 Jon. 158. S. C. *Com. Dig. ib.*



The cases, in which the legislature has required proof of an agreement in writing, are, where the agreement is the subject of an action. The words of the statute are, "no action shall be brought, whereby to charge, &c. unless the agreement, upon which such action shall be brought," &c. Where an action, therefore, is brought to enforce a contract for the purchase of growing crops, which is a purchase of an interest in land, and to recover damages against the defendant for refusing to take away the crops in pursuance of the agreement, the plaintiff cannot maintain his action without proof of an agreement regularly signed and stamped. But if the crops have been taken away by the defendant, and the action is brought to recover the value, the plaintiff will not be precluded from recovering, merely because the agreement, which has thus been executed, was not reduced into writing. Sect. 4.

Although a defendant, in particular cases, is not to be charged in an action brought against him upon an agreement, unless the agreement is proved to be in writing, yet if he has paid money into court on the plaintiff's declaration, it will not be necessary to prove the agreement, which is admitted on the record by such payment. For example, if an action is brought upon a promise to pay another person's debt in consideration of forbearance, and the defendant pays money into court on the count charging him with such promise, in this case he admits the agreement to be binding to a certain extent, disputing only the amount of the debt; and as this admission removes the danger of a false charge, it is reasonable, in such a case, that proof of the agreement should be dispensed with. (1) But an admission by one of the parties, not that the agreement as stated is binding, but merely that such an agreement was in fact made, would not be sufficient to preclude him from availing himself of the statute of frauds; as, where the defendant has admitted the terms of the agreement in his answer to a bill filed against him in Chancery (2); or if

(1) *Ramsbottom v. Brewer, Peake*, (2) *Rondeau v. Wyatt*, 2 H. Bl. N. P. C. 15. 63.

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a parol agreement were stated in a court of law, to which the other party demurs, that would admit the agreement, yet still advantage might be taken of the statute. (1) It may be observed further, that where there is one entire agreement for the performance of several things, if the plaintiff in an action upon this agreement cannot recover upon part of the agreement for the want of a memorandum in writing, he cannot recover at all, although there are some particulars, which would have been valid without writing, if they had formed a separate independent contract. (2)

Promise to  
answer for  
another per-  
son's debt, &c

First, "*No action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which, &c.*" Where the question is respecting the debt of another person, the true consideration is, whether the credit was originally given to the defendant alone, or whether the third person was liable as the debtor, and the defendant only guaranteed the payment. The latter case is within the statute; the established rule being, that, if the person, for whose use the goods are furnished, is liable at all, any other promise by a third person to pay that debt must be in writing (3); but in the former case, namely, where the debt is exclusively the debt of the defendant, a written memorandum will not be necessary. As, for example, suppose a man comes with another into a shop to buy, and the shopkeeper should say, "I will not sell him the goods, unless you will undertake that he shall pay me for them," and the other promises to that effect, such a promise is within the statute (4); but it would be otherwise, if the defendant had been the person originally liable to pay for the goods; as, if nothing more had appeared in the case, than that the defendant sent an order to the plain-

(1) 2 H. Black. 78.

(2) *Lexington v. Clarke*, 2 Vent. 225. *Chater v. Beckett*, 7 T. R. 201. *Cooke v. Tombs*, 2 Anstr. 420. *Lea v. Barber*, ib. 425.

(3) *Matson v. Wharam*, 2 T. R. 80. *Anderson v. Hayman*, 1 H.

*Black*. 120. *Colman v. Eyles*, 2 Starkie, N. P. C. 62.

(4) By Holt, C. J. in his judgment in *Buckmyr v. Darnall*, 2 Ld. Raym. 1087. 1 Salk. 27 S. C.

tiff requesting him to deliver goods to I. S., and that he (the defendant) would pay him the amount. Sect. 4.

The question, in such cases, is a question of fact for the consideration of the jury, who are to determine, whether the credit was given to the defendant alone, or to the defendant jointly with the person who received the goods (1); and in the investigation of this question, if it should appear, (as it did in the last cited case), (2) that such person was debited in the plaintiff's books, or that he had been applied to by the plaintiff for payment, or that he had in a letter to the plaintiff admitted himself his debtor and promised payment at a certain time, (which statement was not contradicted or repudiated by the plaintiff,) these are very strong circumstances in support of the latter conclusion, namely, that the plaintiff considered the third person liable; in which case he cannot make the defendant also liable for the debt, without proof of a written memorandum.

Thus, where the plaintiff had delivered goods to one I. S. in consequence of a parol promise by the defendant in these words, "I will pay you, if I. S. will not," (which undertaking was before the delivery of the goods,) and it appeared further, that I. S. had been entered as the debtor in the plaintiff's books, the Court were of opinion, that the case was clearly within the statute. (3) There, the very terms of the undertaking, independently of the circumstance of I. S. having been debited, manifestly showed, that the defendant intended only to be answerable in case of the default of I. S., and that the plaintiff was in the first instance to look to I. S. as his debtor; and this was the view in which the Court considered the case. And with respect to the other fact in that case, namely, the fact of the undertaking being antecedent to the delivery of the goods, it may be observed, that the question, as to the person to whom credit is given, is rendered more doubt-

(1) *Anderson v. Hayman*, 1 H. Bl. 120. *Browning v. Stallard*, 5 Taunt. 450. (2) See also *Matson v. Wharam*, 2 T. R. 80. (3) *Jones v. Cooper*, Cowp. 227

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ful, when the undertaking is before, than when it is after the delivery. If the undertaking was after the delivery, it cannot have the effect of transferring to the defendant the credit, that was given to the third person at the time of the delivery; if it was before, it is a circumstance to raise a presumption, that the goods were furnished on the credit of the promise; and, if nothing should appear in the terms of the undertaking, or in any other part of the transaction, to induce a contrary presumption, it might warrant the jury in concluding, that they were furnished on the credit of the defendant (1): but it is only a circumstance, and cannot be considered as in any manner conclusive upon the question. (2)

A promise to pay money due from I. S., in consideration that the plaintiff would not sue I. S. for the debt (3), or that he would stay the suit, if already commenced against him (4), is clearly within the statute, and cannot be made the subject of an action without proof of a written promise to that effect. So, a promise to pay damages, which the plaintiff had sustained from an injury done to his horse by a third person, in consideration that the plaintiff would not sue that person, has been held to be a collateral promise, and not binding without a written memorandum. (5) But if the plaintiff were to commence a suit against I. S., not for the recovery of a debt, but for some other cause (as, for an assault, &c.), and the defendant, in consideration that the plaintiff would withdraw his record in that suit, promise to pay a sum of money together with the plaintiff's costs, this would not be a promise to answer for the debt, default, or miscarriage of I. S. within the meaning of the statute; for the cause not being tried, I. S. does not appear to have been guilty of any default or miscarriage, or to be liable to the particular debt, damage, or costs;

(1) See *Harris v. Huntback*, 1 Burr. 373.

(2) See *Keate v. Temple*, 1 Bos. & Pull. 158.

(3) *Rothery v. Curry*, Bull. N.P. 281. *King v. Wilson*, 2 Str. 373.

(4) *Fish v. Hutchinson*, 2 Wils. 94.

(5) *Kirkham v. Marter*, 2 Barn. & Ald. 613.

but it is an original undertaking, upon which an action will lie, although the promise was by parol. (1) Sect. 4.

Where the defendant undertakes, that, if the plaintiff would deliver up to him a fund in his possession adequate to the discharge of certain incumbrances, which have been brought upon it by a third person, he would pay off the incumbrances, this is not such an undertaking, as requires a written memorandum, within the meaning of the statute, although the discharge of the third party may eventually follow. (2) Upon this principle, the case of *Castling v. Aubert* (3) was determined, where the plaintiff (a broker) having a lien on some policies of assurance effected for his principal, for whom he had given his acceptances, the defendant promised in consideration of his giving up the policies, that he would provide for the payment of those acceptances, as they became due; and the Court held, that the plaintiff might recover for the breach of this agreement, though not in writing. So, in the case of *Williams v. Leper* (4), where the defendant, being employed as broker to sell the effects of a tenant of the plaintiff for the benefit of his creditors, made a verbal promise to the plaintiff, who was about to distrain the goods, that he would pay the arrears of rent, if the plaintiff would desist from distraining, the Court of King's Bench were of opinion, that the plaintiff was entitled to recover upon this promise. So, where a verbal agreement was entered into between the defendant and several creditors of an insolvent person, by which the defendant agreed to pay the creditors so much in the pound in satisfaction of their debts, which they agreed to accept and to assign their debts to the defendant, this was considered not as an agreement to answer for the debts of the insolvent, but as the purchase of the debts of the several creditors, which is not prohibited by the statute of frauds. (5)

(1) *Read v. Nash*, 1 Wils. 305.  
*Stephens v. Squire*, 5 Mod. 205. S. P.  
and see 3 Burr. 1839. *Goodman v.*  
*Chase*, 1 Barn. & Ald. 297.

(2) 2 East, 332.

(3) 2 East, 325

(4) 3 Burr. 1886. And see *Houl-*  
*ditch v. Milne*, 3 Esp. N. P. C. 87.  
*Barrell v. Trussell*, 4 Taunt. 117.

(5) *Anstey v. Marden*, 1 New. Rep.  
124.

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A verbal promise by the defendant, to pay the plaintiff for his having provided necessaries for a third person, will be binding, where the defendant was under a legal obligation to provide necessaries; as, in the case of *Watson v. Turner* (1), where, a pauper having been taken suddenly ill, and the plaintiff, an apothecary, having been called in by the pauper's son to attend the pauper without the previous request of the overseers, it was held, that a subsequent parol promise by one of the overseers of the parish, to which the pauper belonged, to pay the plaintiff for his attendance, was binding upon the overseers.

Agreement in consideration of marriage.

Secondly, "*No action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which, &c.*" In the case of *Philpot v. Wallet* (2), it was determined on a special verdict, after much consideration, that mutual promises to marry are within the words and intent of the statute; and it is laid down in *C. B. Comyns's Digest* (3), that, if there be a promise of marriage, there must be a memorandum in writing, as well as where the promise is for payment of money upon marriage. However, there are authorities to the contrary. Mr. Justice Buller, in his law of *nisi prius*, states generally (4), that mutual promises to marry are not within this act, which relate only to contracts in consideration of marriage: and the case of *Cork v. Baker* (5) is referred to as an authority. That was an action of assumpsit on a promise to marry the plaintiff, in consideration of a promise by the plaintiff to marry the defendant; and on a motion in arrest of judgment after a verdict for the plaintiff, the

(1) Bull. N. P. C. 129. The ground of the decision is there said to be, that overseers are under a moral obligation to provide for the poor. The true ground seems to be, that they are under a legal obligation. See 2 East, 506.; and 3 Bos. & Pull, 250., in note. *Lamb v. Bunce*, 4 Maule & Selw. 275. *Wing v. Mill*, 1 Barn. Ald. 104. In the last-cited case, the pauper resided, during his illness, out of the parish, to which he belonged.

(2) Reported in *Skin. 24.*, as of *Mich. T. 33 C. 2.*, and said to be adjourned, North C. J. being absent. S. C., reported in 3 Lev. 65. as of *Hil. T. 54 C. 2.*

(3) Tit. Action on Case upon Assumpsit (F 3), citing the case in 3 Lev. 65.; and referring to *Harrison v. Cage* as contra.

(4) Bull. N. P. 280.

(5) 1 Str. 33.

Court held, that this parol promise was not within the statute of frauds, which relates only to contracts in consideration of marriage, and that the case in 3 Lev. 411. \* has been contradicted by later resolutions. The principal question before the Court in that case seems to have been, whether a promise of marriage was a sufficient consideration to support an action of assumpsit; the other question, namely, whether mutual promises by parol are binding, could not properly come before the Court on a motion in arrest of judgment; for, even supposing, that the declaration ought to have stated the promise to be in writing, (which, however, was not necessary,) still such a defect would be cured after verdict. Another authority, frequently cited in support of the position, that mutual promises of marriage are not within the statute, is the case of *Harrison v. Cage* (1); in the report of which, by Lord Raymond, the point is said to have been so ruled by Ward C. B. on the trial of the cause, and it is added, that it was said at the bar, "that the statute intended only agreements to pay marriage portions, and that it had often been ruled so by Lord Ch. J. Holt," which, as the report states, Lord Holt did not deny. (2) The better opinion, therefore, seems to be, that mutual promises to marry are not within the meaning of the statute, and, though not in writing, may be the subject of an action.

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Thirdly, "*No action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or* Contract or sale of lands, &c.

(1) 1 Ld. Raym. 386. Carth. 467. (2) S. P. so ruled by King C. J. S. C. 5 Mod 411. S. C. 1 Salk. at Maidstone Ass. 1 G; cited in 24 S. C. After a verdict for the plaintiff it was moved in arrest of judgment, on the ground of want of consideration; and this point is the subject of the reports. Com. Dig. tit. Action on Case upon Assumpsit, (F. 3.)

\* The case in 3 Lev. 411. is *Hall and Keene v. Potter*, which was an action of debt on a bond conditioned to procure a marriage. The case of *Philpot v. Wallet*, which relates to the subject mentioned above, is in 3 Lev. 65.

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*concerning them, unless the agreement upon which, &c."*

The first section, as we have seen, relates to interests in, or out of, lands, tenements, &c. actually made or created; this clause of the fourth section relates to a contract or sale of an interest in them. A lease of land is within the first section, unless in some particular cases excepted by the second section; an assignment of a lease is within the third section; and an agreement for the assignment of a lease, or for letting in an under tenant, is within the fourth. (1) With respect to the first particular mentioned in this clause, namely, *contract or sale*, it has been determined, and seems now to be settled, that a sale of land by auction is a sale within the statute. (2) Agreements for the sale of lands, or for the grant of a rent charge, or of a right of common, are contracts for land or tenements, or for an interest in or concerning them; and an action cannot be brought upon them, unless they are in writing. An agreement by parol between parties, in the course of a proceeding before an arbitrator, that he shall determine as to a lease to be granted, is within the statute of frauds, and the award, having directed a lease to be made, cannot be enforced. (3) An agreement for a mere easement in land or tenements, (as, for the liberty of using a way over another person's close, or for nailing the frame-work of a skylight against the wall of his house,) (4) does not convey an interest in the property, and will be binding by parol.

An agreement for an abatement of the rent of lands is clearly within the statute. (5) So is an agreement for a crop growing upon land, conferring an exclusive right to the land during the growth of the crop for the purpose of mak-

(1) Anonym. 1 Ventr. 361. 12 East, 514.

(2) Ruled by Eyre C. J. in *Stansfield v. Johnson*, 1 Esp. N. P. C. 102. S. P., ruled by Eyre C. J. in *Walker v. Constable*, 2 Esp. N. P. C. 659., and afterwards admitted by the Court of C. P. on motion to set aside a nonsuit in the same case, 1 Bos. & Pull. 306. S. C., cited by the Master of the Rolls in *Buckmaster v. Harrop*,

7 Ves. 345. S. P., determined by the Master of the Rolls in *Blagden v. Bradbear*, 12 Ves. 466. S. P., admitted in *Emmerson v. Heelis*, 2 Taunt. 58., and see 9 Ves. 249. 13 Ves. 36.

(3) *Walters v. Morgan*, 2 Cox. Cas. Ch. 369.

(4) *Winter v. Brockwell*, 8 East, 310. n. 11 East, 366.

(5) *O'Connor v. Spaight*, 1 Scho. & Lef. 306.



ing a profit of the growing surface: as, where the agreement was for the purchase of a crop of mowing grass, growing in a close of the defendant; the grass to be mowed and made into hay by the plaintiff; and no time fixed for the commencement of the mowing; this has been determined to be a contract for the sale of an interest in or concerning land. (1) But, where the one party agreed to sell the other a crop of potatoes in a close, at so much for the sack, to be got immediately, the Court considered the contract as confined to the sale of the potatoes, and that it did not convey an interest in the soil, but merely an easement, a right to come upon the land, for the purpose of taking up and carrying away the potatoes. (2)\* And in the later case of *Warwick v. Bruce* (3), where the contract was for all the potatoes growing on a certain quantity of land, at so much per acre, to be dug and carried away by the purchaser, the Court held that the potatoes were the subject-matter of the sale, and that the contract was for a mere chattel.

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Fourthly, "*No action shall be brought upon any agreement, that is not to be performed within the space of one year from the making thereof, unless the agreement upon which, &c.*" This clause applies to those cases only, where the thing is not to be performed within a year, by the express agreement

Agreement  
not to be  
performed  
within a year.

(1) *Crosby v. Wadsworth*, 6 East, 602. 2 Maule & Sel. 208.

(2) *Parker v. Staniland*, 11 East, 562.

(3) 2 Maule and Sel. 205. The contract was made about that time of year, when such crops are usually dug up.

\* It is difficult to distinguish this case from that of *Emmerson v. Heelis* (2 Taunt. 38.), in which the Court of Common Pleas were of opinion, that a sale by public auction, of several lots of turnips then growing, was a sale of an interest in land. Mansfield C. J. who delivered the judgment of the Court, said shortly, that "on this point the case could not be distinguished from the case of hops before decided in the Common Pleas," referring to *Waddington v. Bristow*, (2 Bos. & Pull. 452.) The question there was, whether a contract to buy all the hops growing on certain land at so much by the hundred weight, to be delivered in pockets to the buyers, was exempted from an agreement-stamp by the stat. 23 G. 3. c. 58. s. 4., as an agreement made for, or relating to, the sale of goods, wares, and merchandises; and the Court held, that the contract was not within the exemption.

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between the parties. Cases depending upon contingencies, which may or may not happen in the course of a year, from the time of making the agreement, are not within the statute; as, an agreement to pay a sum of money upon the return of a certain ship (1), or on the day of marriage of the party (2), or an agreement to give a legacy by his last will and testament. (3) In the first of these cases, the ship might by possibility have returned within the year; in the others, the marriage might have taken place, or the death of the party might have happened within that time. And though the contingency, upon which the money was to be paid, did not happen in either case, till after the expiration of a year, yet the promise was adjudged to be binding without any memorandum in writing. Where the agreement is to be performed upon a contingency, and it does not appear from the agreement, that it is to be performed after the year, there a note in writing is not necessary, for the contingency may possibly happen within the year; but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note in writing is necessary. (4) In other words, the clause in the statute includes only those cases, in which it is expressly stipulated, or in which it appears to be the understanding of the parties, as collected from the terms of the agreement, that the contract is not to be performed, that is, completed within the period of a year. (5)

Agreement,  
&c. in writing.

No action shall be brought, whereby to charge, &c. *unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.*

(1) Anonym. case stated by Treby C. J., as the opinion of all the Judges. 1 Salk. 279.

(2) Peter v. Compton, Skin. 353. 1 Ld. Raym. 516. Francam v. Foster, Skin. 326.

(3) Fenton v. Emblers, 3 Burr. 1278. 1 Black. Rep. 355. S. C. Bull, N. P. 280. S. C.

(4) Resolution of the majority of the Judges, in Peter v. Compton, Skin. 555.

(5) Boydell v. Drummond, 11 East, 142. 156. 157. Bracegirdle v. Heald, 1 Barn. & Ald. 722.

First, with respect to the subject-matter of the writing. Sect. 4.  
 Whatever constitutes an essential part of the agreement ought to be expressed, and with sufficient certainty. In the construction of this clause, it has been determined that the word "agreement" must be understood in its proper and correct sense; and that, as the consideration of the promise is part of the agreement, this ought to be stated in writing, as well as the promise itself. Thus, in an action against the defendant upon his promise to pay the debt of a third person, in consideration of the plaintiff's forbearance to sue, the plaintiff cannot recover, unless there is a written memorandum of such consideration. (1) This strict construction of the act, by making it necessary to produce written evidence of the terms, by which the parties meant to be bound, is manifestly best calculated to give effect to the intention, which the legislature had in view, of securing the parties from being charged merely by parol testimony. A letter, therefore, by one of the contracting parties, admitting that he made a parol agreement, but not containing the terms, is not sufficient evidence of an agreement to charge the party. (2) So, a written agreement for a lease under a certain rent ought to specify the term, for which the premises are to be demised (3), or at least ought to refer to some other written instrument, by which the extent of the term may be ascertained. And as the word agreement implies the assent of two or more persons, it is clear, that the contracting parties ought to be named, or the agreement cannot be enforced. (4)

1. Subject-matter of agreement.

However, the words of the statute are not to be construed so strictly, as to make it necessary to state precisely, in the memorandum of the agreement for paying the debt of another person, what is the exact amount of the debt; but it will be sufficient to engage to pay generally, for all the goods furnished

(1) *Wain v. Warlters*, 5 East, 10. (5) *Clinan v. Cooke*, 1 Scho. & Saunders v. Wakefield, Trin. term, Lef. 22.  
 26 June, 1821. (4) *Charlewood v. D. of Bedford*,  
 (2) *Seagood v. Meale*, Prec. Ch. 1 Atk. 497. *Champion v. Plummer*,  
 560. 1 Atk. 12. 9 Ves. 250. 252. 1 New. Rep. 252.  
 11 Ves. 555.

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within a certain time, or whatever sum the person may owe, &c.; and the amount of the goods furnished, or of the debt contracted, is to be ascertained by evidence at the trial. (1) In a late case of this kind, where the promise to pay was made by the defendant in a letter addressed by him to one G., in which he undertook, in case G. would give the bearer D. W. indulgence for a certain time, to see him paid, the Court of King's Bench were of opinion, that the evidence of G. had been properly admitted to prove, what was the amount of the debt, and also that the defendant had applied to him as the attorney of the plaintiff, who employed him to sue D. W. for the debt. (2)

2. What writing sufficient.

Secondly, the agreement, or some memorandum or note of the agreement, is required to be in writing. And here the question arises, what is a memorandum or note of agreement within the meaning of the statute.

It seems to be clear, that a writing may be used as evidence to establish an agreement, although from the disability of one of the parties it may have been void as a legal instrument from the time of its creation, or may have since become void in consequence of a new relation acquired by the party; as, in the case before mentioned of *White against Cuyler*, in an action of assumpsit for wages, a deed executed by the wife of the defendant, though void as the deed of a married woman, was yet admitted for the purpose of shewing the terms of the contract (3); and a bond by a single woman, conditioned to convey her estate to her intended husband in case of their marriage, has been allowed to be good evidence of the agreement in equity, on a bill against the heir of the wife for a specific performance, though the bond became void in law upon their intermarriage. (4)

(1) 15 East, 274. *Stadt. v. Lill*, 272. *Morris v. Stacey*, Holt, N.P.C. 1 Campb. 242. 9 East, 548. S.C. 153.  
 1 Scho. & Lef. 52. 73. (3) 6 T.R. 176.  
 (2) *Bateman v. Phillips*, 15 East, (4) *Cannel v. Buckle*, 2 P.Wms. 242.

Further, it is not necessary, that all the terms, or essential parts of the agreement, should be contained in a single paper. The statute only enacts, that they shall be in writing; and does not require them to be specified by a single instrument. It is, therefore, the common practice to establish contracts by the evidence of several writings; and those writings need not be contemporaneous with the contract. They ought, however, to be connected, or have a plain reference to each other by their contents, or by the context, or at least by writing (1); they cannot be connected by mere parol evidence. Without some reference of this kind, the one cannot be received to support the other, as evidence of the same transaction. Thus, where A. by public advertisement offered lands to be let for a certain term, in consequence of which, a proposal was made by B. and accepted, and an agreement was drawn up in writing between A. and B., specifying the premises and the amount of the rent, but not stating the term, for which the premises were to be demised, nor in any manner referring to the advertisement, it was determined that parol evidence was not admissible, in order to shew the connection of these two writings, and that this defective agreement could not be enforced on a bill for specific performance. (2) So, a minute made in a catalogue of sale at a public auction cannot be coupled or incorporated with the conditions of sale, in order to make a complete memorandum of the agreement, unless the catalogue itself is annexed to the conditions, or has in itself some reference to them. (3)

But if the agreement in the above-mentioned case of *Clinan v. Cooke* had referred to the advertisement, parol evidence might in that case have been admitted, to shew, what was the

(1) 1 Ves. jun. 326. 1 Scho. & Lef. 33. 9 Ves. 250. 12 Ves. 471. 11 East, 157. *Gordon v. Trevelyan*, 1 Price, 64. *Ogilvie v. Foljambe*, 3 Merivale, 61. (3) *Hinde v. Whitehouse*, 7 East, 558. And see *Boydell v. Drummond*, 11 East, 142. 157. Both these cases are on the 17th section of the statute; but applicable also to the 4th.

(2) *Clinan v. Cooke*, 1 Scho. & Lef. 22. 33.

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thing, namely, the advertisement, referred to; for then it would be an agreement to grant for so much time as was expressed in the advertisement, and the identity of the advertisement might be proved by parol evidence. (1) There are several reported cases to this effect. In an action against the defendant for not accepting a lease according to his agreement, it appeared that a draft of the lease had been perused and altered by the defendant's attorney, but was not signed: the defendant afterwards, wishing to relinquish the agreement, wrote a memorandum on the back of the draft, as an authority for the plaintiff to let the premises to any other person, by which memorandum he admitted, that he had entered into the agreement; the memorandum was signed by him, and this was held to be a sufficient signature to bind the defendant. (2) So, in the case of *Allen v. Bennett* (3), (where the question arose upon the seventeenth section,) the Court of Common Pleas determined, that an order for goods, which had been written and signed by the seller (the defendant) in a common memorandum-book of the buyer (the plaintiff), but which did not contain the name of the buyer, might be properly connected with a letter of the defendant to his agent, mentioning the name of the plaintiff as buyer, and also with a letter of the plaintiff to the defendant, claiming the performance of the order. (4)

Where a letter of one of the contracting parties is referred to, for the purpose of supplying the want of his signature in the memorandum of the contract, there ought not only to be a plain reference and connection between the writings, apparent from their context or their superscription, or the like, without the aid of extrinsic evidence, but the letter itself ought to recognise and adopt the agreement as concluded and bind-

(1) 1 Scho. & Lef. 33. 12 Ves. , *Saunderson v. Jackson*, 2 Bos. & Pul. 471. *Gordon v. Trevelyan*, 1 Price, 238. 9 Ves. 250. 253.

(2) *Shippey v. Derrison*, 5 Esp. 64. (4) S. P. by Ld. Hardwicke in *Wellford v. Beazeley*, 3 Atk. 503. *Smith v. Watson*, Bunb. 55. And see

(3) 3 Taunt. 169. 175. And see *Rose v. Cunynghame*, 11 Ves. 550.

ing. (1) In the case of *Tawney v. Crowther* (2), an agree- Sect. 4.  
 ment for the purchase of a house had been reduced into writ-  
 ing, and the defendant promised to sign it on a particular day;  
 in consequence of his delay, the plaintiff wrote a letter, in an-  
 swer to which the defendant said, "there would be time to  
 settle every thing before the day for delivering possession, and  
 that his word should always be as good as any security." Lord  
 Thurlow considered the defendant's letter as clearly referring  
 to the unsigned memorandum of agreement, which was then in  
 his possession, and that it contained a promise to perform the  
 agreement; he admitted, "that if the defendant had meant  
 only to treat further, it would not have taken the case out of  
 the statute." The doubt in this case seems to have been,  
 whether the letter referred sufficiently to the paper containing  
 the terms; and whether the defendant's word was, that he would  
 execute the agreement. (3) \*

Another requisite is, that the agreement, or some memo- Agreement to  
be signed.  
 randum or note of the agreement, should be signed. It will  
 not be sufficient to shew, that the draft of the agreement was  
 read over to the defendant at his desire (4), or that it was re-  
 duced into writing by a person present at the time of making  
 the agreement (5), or even that the defendant perused and al-

(1) *Cooper v. Smith*, 10 East, 107.  
*Kent v. Huskinson*, 5 Bos. & Pull.  
 233. 3 Atk. 503. *Huddleston v.*  
*Briscoe*, 11 Ves. 591.

(2) 3 Bro. C. C. 518.  
 (3) 3 Ves. 713.

(4) *Cooper v. Smith*, 15 East, 103.  
*Wright v. Dannah*, 2 Campb. 203.

(5) *Gunter v. Halsey*, Amb. 588.  
*Whitchurch v. Bevis*, 2 Bro. C. C.  
 559. And see *Champion v. Plum-*  
*mer*, 1 New. Rep. 252.

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\* The decree in the case of *Tawney v. Crowther* was in favour of the plaintiff; yet Lord Thurlow gave the defendant his costs, provided he consented to deliver up possession within a certain time, intimating that he did so in order to secure against an appeal, the property being small. "This circumstance," says Lord Redesdale, observing upon the case in *Clinan v. Cooke*, (1 Scho. & Lef. 34.) "shews, that he considered it a doubtful case, otherwise it would be extraordinary, that the defendant should have his costs, where he was wrong." "I have often discussed that case," continued Lord Redesdale, "and never could bring my mind to agree with Lord Thurlow's decision, for this reason, he considered the letter tantamount to a signing of the agreement, I thought the true meaning was, 'I will not bind myself, but you shall rely on my word.'"

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tered the draft (1); for the statute expressly requires the writing to be signed. But if there is a signing, that is, such an insertion of the party's name, as will authenticate the instrument, it is in general immaterial in what part of the instrument the name is found, whether at the beginning or at the end. (2) The object of the signing is to authenticate the writing, not to identify the party. (3) It has been decided, that a writing, purporting to be an agreement between the plaintiff and A. B. the defendant, for the sale of certain premises, written by the defendant, and beginning thus: "I A. B. agree to sell to, &c." is a writing sufficiently signed to charge the defendant, though he has not signed at the bottom of the paper. (4) And in the case of *Saunderson v. Jackson* (5), Lord Eldon Ch. J., alluding to that decision, is reported to have said, "If a man draw up an agreement in his own hand-writing, beginning, 'I A. B. agree, &c.,' and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute; and yet, he adds, it is impossible not to see, that the insertion of the name at the beginning was not intended to be the signature, and that the paper was meant to be incomplete, until it was further signed." (6)

Whether it will be sufficient, that the defendant's name is mentioned in the body of the memorandum of agreement, (even supposing the memorandum to be drawn up by the defendant himself,) seems to be rather doubtful. (7) In the case of *Stokes v. Moore* (8) the question was, whether instructions for the renewal of a lease, written by the defendant, (in which, among other things, he stated, what rent was to be paid to himself by name,) could be considered a note, or memo-

(1) *Hawkins v. Holmes*, 1 P. Wms. 770. *Shippey v. Derrison*, 5 Esp. N. P. C. 190.

(2) *Ogilvie v. Foljambe*, 3 Merivale, 62.

(3) *Selby v. Selby*, 5 Merivale, 6.

(4) *Knight v. Crockford*, 1 Esp. N. P. C. 189. This writing was attested. See 9 Ves. 248, 249; and 3 Merivale, 2.

(5) 2 Bos. & Pull. 239.

(6) See *Right dem. Cater v. Price*, 1 Doug. 241; and *Selby v. Selby*, 5 Merivale, 2.

(7) 9 Ves. 253.

(8) 1 P. Wms. 770. n. (1), 1786, in Exch. 1 Cox's Cas. 222. S. C. reported more at length.



random of agreement, signed by the defendant; the Court of Exchequer were unanimously of opinion, that “ the signature, required by the statute, is to have the effect of giving authenticity to the whole instrument; and, where the name is inserted in such a manner as to have that effect, it does not much signify, in what part of the instrument it is to be found — as, in the formal introduction to a will — but it cannot be imagined, that a name, inserted in the body of the instrument, and applicable to particular purposes, will amount to such an authentication as the statute requires.” Sect. 4.

A memorandum of agreement, written by the defendant with his name printed, will be as binding as if his name were written (1); by writing the other parts, he recognises and adopts the printed name as his own. And if the party, charged with an agreement, has signed it knowing its contents, though he sign it as witness, yet this is a signing sufficient to bind him. (2) It has been before mentioned, that a party, who has been treating for a lease, is not bound by having perused and altered the draft of the lease; for the statute requires a signing. But it will not be necessary that the signature should be in the draft; if he recognises the draft of the lease as his agreement, by indorsement on the draft (3), or by a letter or memorandum referring to the draft (4), which indorsement or memorandum is signed by him, this will be a sufficient signing within the meaning of the statute.

Further, the agreement, or memorandum or note of the agreement, is to be signed *by the party to be charged therewith, or some other person thereunto by him lawfully authorised.* Signature by party charged &c. Two questions arise here; first, as to the party, who ought to sign; secondly, who is a person authorized to sign for him.

(1) *Saunderson v. Jackson*, 2 Bos. & Pull. 239. *Schneider v. Norris*, 2 Maule & Selw. 286. These cases arose on the 17th section.

(2) *Welford v. Beazeley*, 5 Atk. 505. 9 Ves. 291.

(3) *Shippey v. Derrison*, 5 Esp. N. P. C. 191.

(4) *Blagden v. Bradbear*, 12 Ves. 466.

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## 1. Signing by the party.

With respect to the first question, it appears to be settled, that a memorandum of agreement, naming both parties, but signed by one alone, will bind that party who signs. (1) But unless the memorandum state both the contracting parties, the purchaser as well as the seller, it will not of itself be sufficient to bind the one named, though he has signed it. (2) Thus, where a person makes a minute of a contract in the common memorandum-book of another, stating himself to be the seller, and signs it, but does not name the other person, this will not be sufficient to bind him in an action brought by the other as buyer. (3) However, this omission of the signature of the other party may in many cases be supplied by his letter, or other papers, referring to the same transaction. (4) And, in the case of *Allen v. Bennett*, above cited, if the memorandum of the contract had been inserted in the regular order-book of the plaintiff (the buyer), and if the person to whom it belonged, the place in which it was kept, and the purpose for which it was employed, had been consonant and consistent, perhaps it would not have been too much to infer, that the entry was made by the authority of the owner of the book, for the purpose of evidencing the sale. (5)

## 2. Signing by some one authorised.

Secondly, the agreement is to be signed by the party charged, or some other person thereunto (that is, to the signing,) (6) *by him lawfully authorized*. It is clearly settled, that the agent of the party need not be appointed by writing (7); such an appointment is not required by the fourth section, as it is by the first and third, which relate to the creation or assignment of estates. The memorandum cannot properly be signed

(1) *Hatton v. Gray*, 2 Ch. Cas. 164. *Coleman v. Upcott*, 5 Vin. Ab. 527. pl. 17. *Cotton v. Lee*, cited in *Seton v. Slade*, 7 Ves. 265. *Fowle v. Freeman*, 9 Ves. 351. *Wain v. Warlters*, 5 East, 10. *Saunderson v. Jackson*, 3 Bos. & Pull. 238. *Egerton v. Matthews*, 6 East, 307. *Allen v. Bennett*, 3 Taunt. 169. 175. See *Lawrenson v. Butler*, 1 Scho. & Lef. 20.; 11 Ves. 592.; 5 Ves. & Beam. 187.

(2) *Champion v. Plummer*, 1 New Rep. 252, and *Klinitz v. Surry*, 5 Esp. N. P. C. 267., which were on the 17th section.

(3) *Allen v. Bennett*, 3 Taunt. 169.

(4) *Western v. Russell*, 3 Ves. & Beam. 187.

(5) 3 Taunt. 175., by Mansfield C. J.

(6) 1 Ves. & Beam. 207.

(7) *Coles v. Trecothick*, 9 Ves. 250.

by one of the contracting parties, as the authorized agent of the Sect. 4.  
other; the agent must be a third person. (1)

An auctioneer, attending at the public sale of an estate, is undoubtedly the agent of the seller; and his receipt for the deposit will be a sufficient note or memorandum of the agreement, provided he states the terms and other essentials, or else refers to some other writing, by which they may be ascertained. (2) But although he is an agent authorized to sell at a particular price, and to sign for the principal, yet his clerk is not authorized to sell in his absence without the consent of the principal. (3)

An auctioneer appears also to be properly considered an agent for the purchaser. In the case of *Stansfield v. Johnson* (4), *Eyre C.J.* ruled the contrary; but this opinion at *nisi prius* seems to be overruled by the case of *Emmerson v. Heelis* (5), and *White v. Proctor*. (6) In each of those cases, the auctioneer set down the name of the highest bidder in a bill or particular of sale; and the Court of Common Pleas were of opinion, that this was a memorandum in writing, signed by an agent of the purchaser, against whom the action was brought. "By what authority," said Ch. Justice Mansfield in the first case, "does the auctioneer write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings so loud and particular, as to be heard by the auctioneer. For what purpose is this done? That he may write down their names opposite to the lots; therefore he writes the name by the

(1) *Wright v. Dannah*, 2 Campb 203.

(2) *Blagden v. Bradbear*, 12 Ves. 471. 13 Ves. 473. 7 East, 569.

(3) *Coles v. Trecothick*, 9 Ves. 234. 243. See also *Blore v. Sir R. Sutton*, 3 Merivale, 237.; in which one of the points was as to a signing by the agent's clerk.

(4) 1 Esp. N. P. C. 102., cited as to this point by the Master of the Rolls in *Buckmaster v. Harrop*, 7 Ves.

345. The point does not appear to have arisen in *Walker v. Constable*, 2 Esp. N. P. C. 659. 1 Bos. & Pull. 506. S. C.

(5) 2 Taunt. 31.

(6) 4 Taunt. 209. *Kemeys v. Proctor*, 3 Ves. & Beam. 57 S. P. And see 1 vol. of *Cases and Opinions*, 143.; and *Hinde v. Whitehouse*, 7 East, 558. 569. *Coles v. Trecothick*, 9 Ves. 349.

Sect. 17. authority of the purchaser, and he is an agent for the purchaser." It appears from the same case (1), that the auctioneer is duly authorized to sign, although the purchaser has an agent to bid for him at the sale.

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to sale of  
goods.

The seventeenth section of the statute of frauds enacts, "that no contract for the sale of any goods, wares, and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note, or memorandum in writing, of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

An agreement to sell goods for a certain price, to be paid on delivery, would have been a valid contract, according to the rules of common law; so that if the buyer had made a regular tender of payment at the appointed time, or, if no time were fixed, within a reasonable time, and the other party had refused to deliver, he might have brought his action against the seller for a breach of the contract; or, if the seller had afterwards sold the goods to another person, without any default in the first buyer, he would have been subject to an action of trover. But the rule of law is now altered by the statute of frauds, on a sale of goods for the price of ten pounds or upwards; in which case, the contract of sale will not be binding, unless one of the three requisites mentioned in this section has been strictly observed. Where, indeed, it is stipulated, that the contract is not to be performed within the space of a year, there, as we have before seen, a written memorandum of the agreement is made necessary by the fourth section; and the giving of something in earnest, or in part of payment, would not be sufficient, it is presumed, in such a case to dispense with that requisite. As, where the contract

(1) *Emmerson v. Heelis*, 2 Taunt, 48.

is to make a carriage at a certain price, and deliver it at the end of a year and a half, there a written memorandum is necessary, for the reason before mentioned; although, as will be presently shown, no such memorandum would be absolutely necessary, if the stipulation, respecting the delivery after the year, were omitted.

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On the construction of this section, an opinion at one time prevailed, that it did not apply to executory contracts, that is, to contracts not to be immediately performed. (1) In the case of *Towers v. Sir J. Osborne* (2), Ch. J. Pratt ruled, that an action would lie for the value of a chariot, which the defendant had bespoke and afterwards refused to take, though there was no written memorandum of the bargain, and no earnest; the Ch. Justice being of opinion, that this was not a case within the statute of frauds, which relates only to contracts for the actual sale of goods, where the buyer is immediately answerable, (unless time is given to him by special agreement,) and where the seller is to deliver the goods immediately. Yet it seems evident from the words used by the legislature, which are very general and extensive, that the provision was intended to comprehend executory as well as other contracts. Indeed, such a provision is peculiarly necessary in the case of executory contracts; because they are in their nature more likely than any others to be attended by that uncertainty and confusion, which it was the great object of the legislature to prevent. It has therefore been settled by the later authorities, that executory contracts for the sale of goods, wares, and merchandizes, to be delivered at a future time, to the amount specified, are within the meaning of the statute. (3)

Executory contracts.

(1) See the ground of the decision in *Towers v. Sir J. Osborne*, by Pratt C. J., 1 Str. 505. which was adopted by the Court of K. B. in *Clayton v. Andrews*, 4 Burr. 2101. S. P. Bull. N. P. 279. S. P. by the opinion of Yates, J. in *Simon v. Metivier*, 1 Black. Rep. 602. S. P. by Wilson, J. in *Alexander v. Comber*, 1 H. Bl. 20. See 1 Taunt. 820.

(2) 1 Str. 505.

(3) *Rondeau v. Wyatt*, 2 H. Bl. 65. *Cooper v. Elston*, 7 T. R. *Alexander v. Comber*, 1 H. Bl. 20.

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But still, it may be observed, although one of the grounds (namely, the executory nature of the contract), upon which the decision in the case of *Towers v. Sir J. Osborne* partly proceeded, has been contradicted, yet the decision in that case has not been overruled, and may be supported on another ground. There the contract was not for the purchase of goods, but for the making of something, which had no existence at the time; it was a contract for work and labour to be done, and materials, &c. to be supplied, and distinguishable from a mere contract of sale, to which species of contract alone the statute is applicable (1); for the seventeenth section speaks of acceptance of part of the goods, as one of the requisites to bind the bargain, and is supposed therefore not to extend to those cases, in which the subject-matter of the contract is incapable of delivery and part-acceptance. (2) So, in the case of *Clayton v. Andrews* (3), where the contract was for a quantity of wheat, to be delivered some weeks afterwards, the wheat at the time of the contract being unthrashed, the Court of King's Bench were of opinion, on the authority of the last case, that the contract was binding, without any earnest or delivery of part, and without any written memorandum. Here also, as it has been observed, some alteration was to be made in the state of the commodity previous to the delivery (4); for it was necessary that the corn should be first thrashed. This perhaps may seem a very nice distinction; but still the work to be performed in thrashing made, though in a small degree, a part of the contract. In the case of *Rondeau v. Wyatt* (5), the defendant made a verbal contract to sell and deliver a certain number of sacks of flour to the plaintiff, to be put in sacks which the plaintiff was to send,

(1) See the opinion of Lawrence J. in *Cooper v. Elston*, 7 T.R. 17., and in *Emmerson v. Heelis*, 2 Taunt. 42.; and the judgment of Lord Loughborough in *Rondeau v. Wyatt*, 2 H. Bl. 67. See also *Mucklow v. Mangles*, 1 Taunt. 320.

(2) *Groves v. Buck*, 3 Maule & Sel. 179. 1 Taunt. 320.

(3) 4 Burr. 2101.

(4) By Lawrence J. in *Cooper v. Elston*, 7 T. R. 17. and Eyre C. J. in *Rondeau v. Wyatt*, 2 H. Bl. 67.

(5) 2 H. Bl. 67. *Astey v. Emery*, 4 Maule & Selw. 262.

and to be shipped on board of vessels to be provided by him; and the Court of Common Pleas, after much consideration, were of opinion, that the plaintiff could not recover, as the requisites of the statute had not been complied with. Here the subject-matter of the contract (the flour), though it was to be put into sacks and shipped by the defendant, was yet in a deliverable condition, and specifically the same article from the first to the last; in the other case, the corn was unthrashed, and not in a state capable of delivery.

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Sales of real property by auction have, as was before mentioned, been frequently determined to be within the 4th section; and from reading the words of the 17th section, which are very general, and apply without exception to all contracts for the sale of goods, it might be supposed that sales by auction were intended no less than other kinds of sale. However, in the case of *Simon v. Motivos* (1), the Court of King's Bench inclined to be of opinion, that a sale of goods by auction was not within the statute. "The solemnity," said Lord Mansfield, "of that kind of sale precludes all perjury, as to the fact itself of sale." He added, "According to the inclination of my present opinion, auctions in general are not within the statute; but this is not necessary to be now determined." Mr. Justice Wilmot said, "It may be a great question, whether sales by auction are within the statute; I am inclined to think sales by auction, openly transacted before five hundred people, are not within the statute." Mr. Justice Yates said, "I much doubt, whether the contract was within the statute of frauds." Mr. Justice Aston said nothing upon the point. The case was determined principally upon the ground, that the note of the auctioneer, mentioning the buyer's name and the price, &c. in the usual manner, was a memorandum of the bargain by him as agent of the buyer; and another circumstance, namely, that the goods were, on the day after the bidding, weighed out to the buyer's servant, was thought to be very material. Upon

Sale by  
auction.

(1) 1 Black. 599. 3 Burr. 1922. adding, that the Court inclined to be S. C. The report in Burrow is very short, and merely notices the point, of this opinion.

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the whole, the question seems not to be completely settled by the case of *Simon v. Motivos*, which, it may be observed, was antecedent to those before mentioned upon the fourth section. The point was very little considered; and the plain construction of the statute most clearly applies to all contracts for the sale of goods, as well those at a public auction as by private sale.

The observations on this subject in a late case (1) are extremely strong, and deserving of the greatest consideration. "With all deference to these opinions," said Lord Ellenborough, alluding to the opinions in the case of *Simon v. Motivos*, "I do not at present feel any sufficient reason for dispensing with the express requisition, of a memorandum in writing, in a statute applying without exception to all sales of goods above the value of 10l., merely because the quantum of parol evidence, in the case of an auction, is likely to render the danger of perjury less considerable. That argument in a degree applies to all sales in market overt; and if we once get loose from the positive words of the statute, it will become a question only of the quantum and degree of danger of perjury in each particular instance; which opens a door to an indefiniteness of construction founded on all the varying circumstances of the time and frequency of persons attending the place of sale; which would be destructive of all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial to the trading world who are to be governed by it. I am not therefore prepared to say, that sales by auction are not meant to be comprehended within the statute. Nor would I be understood as giving any conclusive opinion to the contrary: neither is it necessary that I should, upon the present occasion."

Acceptance of  
part, &c.

The case mentioned by the statute, in which a written memorandum will not be required, is where the buyer *accepts part of the goods sold, and actually receives the same, or gives*

(1) *Hinde v. Whitehouse*, 7 East, 568.



*something in earnest to bind the bargain, or in part of payment.* Sect. 17.

The acceptance, here intended, is the ultimate acceptance, such as completely affirms the contract. (1) An acceptance of a sample will in many cases be an acceptance of part of the goods sold. This must depend upon the manner in which the sample is taken. If the sample, by the terms of the contract, is to be considered as a part of the purchase, to make up the quantity, and is delivered as such, it is clearly an acceptance of part of the goods; although the sample may also be partly delivered as a specimen of quality (2): but it will be otherwise, where the sample is delivered merely as a specimen, and not taken as part of the goods. (3)

Where the goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery; but it may be done by what is tantamount, as, by the delivery of the key of the warehouse, in which the goods are lodged, or by delivery of other symbols of property. (4) The delivery of the muniments of a ship is equivalent to the delivery of the ship itself, as the delivery of the keys of a warehouse is a delivery of the goods in it. (5)

. An order by the vendor, of goods to a wharfinger, to deliver them to the buyer, is sufficient to pass the property to the buyer, provided nothing remains to be done but to make the delivery. (6) Where an order, for the delivery of the goods, had been given by the seller to the buyer, requiring his warehouseman to deliver the goods to the buyer, which was afterwards countermanded, this was such an acceptance, as would entitle the buyer to maintain an action against the seller for

(1) 3 Bos. & Pull. 235.

(2) *Hinde v. Whitehouse*, 7 East, 558. *Talver v. West*, Holt, N. P. C. 178. *Blenkinson v. Clayton*, 1 Moore, C. P. 528.

(3) *Cooper v. Elston*, 7 T. R. 14. *Klinitz v. Surry*, 5 Esp. N. P. C. 267.

(4) By Lord Ellenborough, C. J. 1 East, 1094. 1 Taunt. 460.

(5) By Lord Hardwicke, 1 Atk. 171. The cases on the subject of

a constructive delivery are fully and clearly arranged in Bell's Commentaries on the Commercial Laws of Scotland, vol. i. p. 60.

(6) By Gibbs Ch. J. *Withers v. Lys*, Holt, N. P. C. 20. and see *Lucas v. Dorrien*, 7 Taunt. 289.; where a written order on the wharfinger for delivery, communicated to him, and assented to by him, was held sufficient to pass the property.

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breach of the contract, without any written memorandum (1) But where something is required by the order, to be done previous to the delivery, as, where the order to the wharfinger is to *weigh and deliver*, there the transfer is not complete till that thing be done. (2)

Where goods have been weighed and measured by order of the buyer, and in the presence of the buyer, (so that he cannot afterwards object to the quantity or quality of the goods,) this may be considered a sufficient acceptance to bind him, in an action for goods sold and delivered. (3) So, if the buyer write his name on the goods at the time of the purchase, this will be evidence against him, that he intended to appropriate them to his own use, and, if that was his intention, there is a sufficient delivery. (4) So, where the defendant, having bought of the plaintiff a quantity of hay, sold part of it afterwards to another person, this was dealing with the commodity, as if it were in his actual possession, from which the jury might infer a delivery by the plaintiff, and an acceptance of the goods by the defendant. (5) And where the buyer, on the purchase of goods, desired the plaintiff (the seller) to keep them for him in his (the seller's) possession, (as, on the sale of horses, to keep them for him at livery in his stable,) and he accepted the order, this was held to be a sufficient delivery of the goods within the statute of frauds, and a written memorandum of the bargain was thought not to be necessary. (6)

Two other cases, on this clause of the statute of frauds, have been lately determined. In the case of *Howe v. Palmer* (7), which was an action for not accepting goods bargained and

(1) *Searle v. Keeves*, 2 Esp. N. P. 233. *Anderson v. Scott*, ib. 235. n. C. 598. 14 East, 512.

(2) *Shepley v. Davis*, 5 Taunt. 622. The order to the wharfinger was the only authority that had been given for the delivery. *Withers v. Lys*, Holt, N. P. C. 18 S. P. C. P. 328.

(3) 1 Blackst. 601. 1 Taunt. 459. 458. *As to this case, see 3 Barn. & Ald. 324.*

(4) *Hodgson v. Le Bret*, 1 Campb.

(5) *Chaplin v. Rogers*, 1 East, 192. *Blenkinsop v. Clayton*, 1 Moore

(6) *Elmore v. Stone*, 1 Taunt. 458. *As to this case, see 3 Barn. & Ald. 324.*

(7) 3 Barn. & Ald. 321.

sold, it appeared, that the defendant had verbally agreed with Sect. 17.  
an agent of the plaintiff, at a public market, to purchase a certain quantity of tares, and to send for them to the plaintiff's premises, where they were then deposited; a sample was offered to the defendant, as a specimen of the quality of the goods, but the defendant did not receive it, considering it unnecessary; and it was agreed, that the goods should continue on the plaintiff's premises till the defendant wanted them for sowing. The plaintiff's agent, on his return, measured out the goods, and set them apart, ready to be delivered to the defendant, whenever he might call for them. The Court of King's Bench determined, that what had been done ought not to be considered, in point of law, as an acceptance, since it was clear that the defendant might, after the measuring, have objected to the quality or quantity of the goods. In the last case of *Tempest v. Fitzgerald* (1), the defendant had agreed to purchase a horse of the plaintiff for ready money, and to take him away within a fixed time; shortly before the expiration of that time, the defendant rode the horse, and gave directions concerning his treatment, &c., but requested the plaintiff to keep the horse some time longer, at the end of which time he promised to take the horse and pay for him; but before that time the horse died; the Court of King's Bench held, that the plaintiff could not maintain an action for the price of the horse, as payment of the price was to be an act concurrent with the delivery of the horse, and before payment the plaintiff had no right of property in the horse, and could not exercise any right of ownership.

A delivery of purchased goods to a carrier, named or appointed by the purchaser, to be carried by him and delivered to the purchaser, is equivalent to an acceptance by the purchaser himself, the carrier being here employed as his servant or agent; and a delivery to the carrier's servant, in the course of business, will have exactly the same effect. So,

(1) 3 Barn. & Ald. 680.

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where goods have been verbally ordered by the defendant, and shipped by the vendor (the plaintiff), in the same manner as had been done in the course of previous dealings between the same parties, it has been held, that the defendant must be considered as having constituted the master of the ship his agent to accept and receive the goods; consequently, that the plaintiff is entitled to recover in an action for goods sold and delivered, without proving that the goods have ever come into the defendant's possession. (1) And where no previous dealings appear to have passed between the parties, and nothing has been said respecting the carriage by a particular carrier, it must be understood, that the goods are to be delivered in the most usual and convenient mode. (2)

One of the latest cases upon the subject of delivery, is the case of *Astey v. Emery*. (3) It appeared there, that a corn-factor at N. agreed to sell to the defendant some barley belonging to the plaintiff, which was then in the hands of a third person at N.; the corn was to be delivered at a warehouse of the corn-factor at D., and to go by his first boat from N. to D.; and the price agreed upon was higher, as the corn was to be delivered at his expence. The barley went accordingly by his first boat. Before it set off, the defendant desired the person, in whose hands it was, to see it measured, delivered, and put up properly; and a few days after the corn had been sent, the invoice was delivered at D, to the defendant, who requested time to pay, but afterwards refused to accept. It was contended, that there was an actual delivery in this case; but the Court of King's Bench held, that as the delivery was to be at D., the buyer had no right to take possession at N., and that there was not any acceptance of the goods within the meaning of the statute.

**Contract for  
transfer of  
stock.**

It has been doubted, whether contracts for the transfer of stock are within this section. The argument in support of

(1) *Hart v. Sattley*, 3 Campb. 528. Campb. 639. *Copeland v. Lewis*, 2 Starkie, N. P. C. 55. See *Anderson v. Hodgson*, 3 Price, 650.  
(2) *Dutton v. Solomonson*, 5 Bos. & Pull. 523. *King v. Meredith*, 2 (3) 4 Maule & Selw. 262.

the negative is, that the statute only applies to such goods or merchandize as can be delivered or accepted. On the other side, the answer is, that the thing contracted for needs not be of such a nature as can be delivered into the other party's hands; but in that case, either earnest or a memorandum in writing will be sufficient. This point was argued in the case of *Pickering v. Appleby* before all the judges, who were equally divided in opinion. (1) But in the case of *Crull v. Dodson* (2), where a broker pretended to have sold part of his employer's stock, (which was South Sea stock,) and taken the residue at a certain price, and his employer filed a bill against him for the difference between that price and the current price as to what he had bought, Lord Chancellor King thought the sale fraudulent, and assigned as a reason, that earnest should have been taken, because the case had been determined to be within the statute of frauds. And in the case of *Mansell v. Cooke* (3), where a bill was filed for the specific performance of a contract for South Sea stock, and the defendant insisted on the statute, the Chancellor seemed to be of opinion, that the case was within the statute, and said, it had been so held in many other cases; but he decided against the defendant's plea, because the pleading was bad.

If there is not any acceptance of part of the goods, nor any thing given in earnest to bind the bargain, the statute requires, that *some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorized.* The only difference between this and the fourth section is, that by the fourth, the memorandum of the *agreement* is to be in writing, and signed by the *party* to be charged, or by some *person* authorized by him; here, the memorandum of the *bargain* is to be in writing, signed by the *parties* to be charged or their authorized *agents*. The term "*agreement*," in the former, has been understood, as was before mentioned, in its correct legal sense, including the

Note or memorandum of bargain.

(1) See *Colt v. Netterville*, 2 P. Wms. 307. Mich. T. 1725.

(2) Set. Cas. temp. King. 41. July, 1725.

(3) Prec. Ch. 533.

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consideration of the promise as well as the promise itself; but in the construction of this clause, the term "bargain" is taken in a more general and common sense. Thus, in an action for not accepting goods ordered by the defendant, if the memorandum specify the quantity of goods purchased, that has been thought sufficient, without also specifying the consideration or price to be paid. (1)

## Signing.

With respect to the signature, the same construction has been put upon this section, as upon the fourth. A memorandum of the bargain, naming both parties, and signed by the defendant, will be sufficient to bind him, although the other party has not signed, and consequently is not bound. (2) Where a broker acts between a buyer and seller, his signature is the signature of both parties (3); and an entry in his book, stating the sale of the goods from the one to the other, and signed by him, is a binding contract between the parties. The notes of the contract, called the bought and sold notes, which the broker usually copies out of his book, are intended as notices to inform the parties of the terms of the sale; but the contract is binding from the original entry made by the broker. (4)

An auctioneer, who presides at the sale of goods, is considered to be the agent of the purchaser as well as of the seller, and a memorandum of the bargain signed by him will be binding upon both parties. (5) This has been uniformly held,

(1) *Egerton v. Matthews*, 6 East, 307. In this case, however, it is to be observed, the *rate of payment*, (namely, so much per pound,) was stated; and as this affords a medium for the calculation of the whole amount, it may properly be considered the same, as if the amount itself had been specified. This circumstance does not appear to have been noticed.

(2) See ante, p. 88.

(3) 7 East, 569. 3 Taunt. 173. *Heyman v. Neale*, 2 Campb. 357.

(4) *Heyman v. Neale*, 2 Campb. 337. In the case of *Wright v. Dan-*

*nah*, 2 Campb. 303., Lord Ellenborough C. J. held, that a note of sale, written by the plaintiff under the defendant's inspection, and containing the defendant's name, would not bind the defendant as a *memorandum signed by his agent*. There was not the least evidence in this case, that the seller of the goods had been authorised, as agent, to write down the name of the defendant (the purchaser).

(5) *Simon v. Motivos*, 1 Blac. 599. See ante, p. 89.

ever since the case of *Simon v. Motivos*. (1) As to the ques- Sect. 17.  
tion, what is a sufficient memorandum of a sale by auction,  
several cases have been already cited with reference to the  
fourth section, which apply equally to the seventeenth. And  
in addition to those cases that of *Phillimore v. Barry* (2) may  
properly be mentioned. There the auctioneer had written  
in the printed catalogue the initials of the name of the de-  
fendant's agent, to whom the goods were sold, together with  
the prices, opposite to the lots purchased by him, and the  
principal afterwards in a letter to the agent recognised the  
contract; and it was held, that the letter and the entry in  
the catalogue might be coupled together, and would consti-  
tute a sufficient memorandum of the bargain within the statute  
of frauds.

(1) See 7 East, 569. 2 Taunt. 45. (2) 1 Campb. 513.

#### CHAP. IV.

##### *Of Evidence in an Action of Assumpsit, on the Sale of Real Property.*

**I**F the buyer or seller of property refuse to perform the con-  
tract, the other party may bring an action of assumpsit for the  
breach of the contract. The plaintiff, in support of this action,  
will have to prove the contract or particulars of sale; the per-  
formance of every thing to be done on his part; and the breach  
of the contract by the defendant.

First, of the action by a vendor of real property.

1. Action by  
vender.

The best evidence to prove the contract of sale is the Proof of con-  
tract.  
contract itself, and this must be in writing. (1) Where  
the estate has been sold at a public auction, such conditions  
and particulars of sale, as are stated in the declaration, must

(1) See *supra*, p. 70.

be proved at the trial. The verbal declarations of an auctioneer, at the time of the sale, are not admissible for the purpose of varying, adding to, or explaining the printed conditions of sale. (1)

**Proof of vendor's performance of his part.**

The vendor, in support of this action, must prove, that he was ready on his part to perform every thing which the contract required him to do, when the other party ought to have completed the purchase. It is a general rule, applicable to all contracts of sale, that, where two concurrent acts are to be done, the party, who sues the other for non-performance, must aver and show, that he performed, or was ready to perform, his part of the contract; and when the plaintiff is first to do an act, to entitle himself to the action, he must either show the act done, or, if it is not done, at least that he has performed every thing that was in his power to perform. (2) If the other party stops him, intending not to perform his part, (as where the draft of an assignment was shown to the defendant for his approbation of the form, but he refused to read it, and discharged the plaintiff from executing it, intending not to pay the money,) in such a case it is not necessary for the first party to go farther and do a nugatory act (3); but he may aver, that he tendered the draft, and that the other party discharged him from executing it; or that he tendered the assignment, and that the other party refused to accept it.

**Proof of vendor's title.**

In an action against the defendant for not accepting the conveyance of an estate, which he agreed to purchase on having a good title, the plaintiff may aver generally that he was seised in fee (4), and at the trial will have to produce the evidence of his title to an estate in fee-simple. If the defendant has refused to accept an abstract of the title, it will be sufficient

(1) Vol. i. part 2. c. 10. s. 2.

(2) *Goodison v. Nunn*, 4 T. R. 761. *Morton v. Lamb*, 7 T. R. 129. *Glazebrook v. Woodrow*, 8 T. R. 566. 1 East, 210. *Mason v. Corder*, 7

Taunt. 9. 2 Marshall, 352. *Ferry v. Williams*, 8 Taunt. 62.

(3) *Jones v. Barkley*, 2 Doug. 684. 694. *Phillips v. Fielding*, 2 H. Bl. 123. 5 East, 302.

(4) *Martin v. Smith*, 6 East, 555.



if the deeds show a good title subsisting in the plaintiff at the time of the trial, although it was not complete even until after the commencement of the action. (1)

Where the title-deeds of an estate are produced, in an action for the non-performance of an agreement of purchase, as proof of a good title in the plaintiff (the vendor), it will not be necessary to prove their execution by calling the subscribing witnesses. This point was decided, in the case of *Thomson v. Miles*. (2) Lord Kenyon there said, he would never allow, that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, nor expected in making out a title in any case of purchase, more particularly where possession has accompanied the deeds; and they were therefore admitted without proof of the execution. In a late case before Lord C. J. Mansfield (3), where, in an action of assumpsit upon an agreement to purchase a leasehold house, it appeared that the plaintiff, the vendor, was the third or fourth assignee of the term, and it was contended that he need only prove the execution of the last assignment, it was ruled otherwise; and he was compelled to prove the lease and all the meane assignments. However, Lord Kenyon's decision was not adverted to; and as that is understood to coincide with the practice in these cases, it can scarcely be considered as over-ruled. (4)

The defendant, under the general plea of non-assumpsit, may show that the contract is absolutely void on account of fraud practised against him by the plaintiff: as, where the plaintiff has fraudulently misrepresented the quality or value of the property; or wilfully misdescribed its locality, so as to make it appear more valuable. (5) And if persons have been employed to bid for the owner at a public sale, not for the

Evidence under general issue.  
Fraud.

(1) *Thomson v. Miles*, 1 Esp. N.P.C. 185.

(2) 1 Esp. N.P.C. 184.

(3) *Crosby v. Percy*, 1 Campb. 303.

(4) See Sugden's Treatise on the Law of Vendor and Purchaser, p. 195.

(5) *D. of Norfolk v. Worthy*,

1 Campb. 337. 12 East, 637.

purpose of preventing a sale at an under-value, but to take advantage of the eagerness of bidders and screw up the price, (the effect of which bidding for the owner has been to raise the price of the estate above its true value,) this seems also to be a fraud practised upon the defendant. (1)

**Defect of title.**

The defendant may show a defect of title in the vendor, and on that ground rescind the contract: as, where the vendor had an interest in the premises for a shorter term than he contracted to sell (2); or where the premises are subject to an incumbrance or annual payment, of which no notice had been given. (3) If the purchaser has not made an application for the title before the commencement of the action, and no time is fixed for completing the contract, he cannot object that the title was defective at the time when the contract was made: it will be sufficient, in such a case, if the vendor show a complete title at the time of the trial, though it was not complete, when the action was commenced. (4)

**II. Action by vendee.**

Secondly, as to the action by the purchaser.

If the purchaser has paid any part of the purchase-money, and the seller refuses to complete his part of the contract, the purchaser may make his election, either to affirm the contract, by bringing an action for the non-performance, or to disaffirm the contract *ab initio*, and bring an action for money had and received to his use. (5) The contract must be disaffirmed *ab initio*, or not at all. If the purchaser has had an occupation of the premises under the contract, he adopts the contract, and cannot disaffirm it afterwards by quitting the premises, as the parties cannot be put into the same situation in which

(1) See *Smith v Clarke*, 12 Ves. 485; and the cases collected on this subject, in Sugden's *Treatise on the Law of Vendor and Purchaser*, p. 17—22.

(2) *Farrer v. Nightingal*, 2 Esp. N.P.C. 639. *Hibbert v. Shee*, 1 Campb. 113.

(3) *Turner v. Beaurain*, MS. case stated in Sugden's *Law of Vendor and Purchaser*, 227. *Barnwell v. Harris*, 1 Taunt. 430.

(4) *Thomson v. Miles*, 1 Esp. N.P.C. 184.

(5) *Dutch v. Warren*, cited by Lord Mansfield, 2 Burr. 1011. *Farrer v. Nightingal*, 2 Esp. N.P.C. 641.

they before stood; consequently, in such a case, an action for money had and received cannot be maintained, but the only remedy is on the special agreement. (1) The plaintiff in this case, as in the last, will have to prove the contract, the conditions of sale, the performance of every thing requisite on his part, and the breach of the contract on the part of the defendant.

When the plaintiff's claim to recover the deposit rests on a defect of title in the vendor, the plaintiff must prove the title defective; and it will not be enough to prove, that the title has been deemed by conveyancers to be insufficient. (2) The vendor is to give a good title; and must be prepared to make out a good legal title, on the day when the purchase ought to be completed; and, if he is not then ready to verify his abstract by the title-deeds in his possession, the purchaser may avail himself of the default, and avoid the contract. (3) In the case of *Chambers v. Griffiths* (4), the property, which the plaintiff had purchased, and on which he had paid the deposit, consisted of several parcels, and were sold at a public auction in distinct lots, yet Lord Kenyon held, that as the vendor had given an abstract of the title only to a single lot, and refused to deliver an abstract as to the rest, the purchaser might rescind the whole contract: Lord Kenyon considered the purchase of the several lots, as having been made with a view to a joint concern, and that the contract, for the convenience and interest of the purchaser, must be understood to be one entire contract for the whole. However, since according to the rule of law there seems to have been a distinct contract upon each distinct lot (5), perhaps it may be doubted whether a breach of contract upon one lot would be a breach as to any of the rest.

Action to recover deposit.

Whether an equitable defect of title, (that is, such a defective title, as a party would not be compelled by a court of

Equitable defect of title.

(1) *Hunt v. Silk*, 5 East, 449.

(4) 1 Esp. N. P. C. 149.

(2) *Camfield v. Gilbert*, 4 Esp. N. P. C. 221.

(5) See *Emmerson v. Heelis*, 2 Taunt. 36.

(3) *Cornish v. Rowley*, MS. case, stated 1 Selw. N. P. 175.

equity to accept, in case of a bill for specific performance,) is a sufficient ground for rescinding the contract, in an action to recover the deposit, is a question, upon which there has been some difference of opinion. In the case of *Elliott v. Edwards* (1), the Court of Common Pleas held, that an equitable incumbrance was a reasonable objection to the title offered by the vendor. However, the better opinion seems to be, that a court of law will not inquire into such defects. In the case of *Alpass v. Watkins* (2), which was determined two years before the last-mentioned case, though not there referred to, Lord Kenyon, (in answer to an objection, that the title would be moulded in equity to a variety of purposes, and consequently that the defendant could not make out a perfect title,) said, he was clearly of opinion, they could not do otherwise than determine, sitting as they were in a court of law, that, as the defendant could make out a good legal title, he was not liable to repay the deposit money. And in the late case of *Sir S. Romilly v. James* (3), where it was suggested in argument, that the plaintiff would not be entitled to recover back the deposit, if any doubt could be cast on the title of the vendor, the Lord Chief Justice Gibbs expressed an opinion, that although a court of equity might not perhaps have obliged an unwilling purchaser to ratify the contract, yet that as the party had resorted to a court of law, he must abide by the decision of a court of law.

Costs of examining the title.

Where the contract is unexecuted on account of the default of the defendant, and has consequently been rescinded *ab initio*, the plaintiff may not only recover the deposit with interest, but also the expences of investigating the title, as special damages (4): such expences, however, can only be recovered on a count specially framed, and not on the common count for money paid to the use of the defendant; the money having been expended entirely for the satisfaction of the plaintiff (5):

(1) 5 Bos. & Pull. 181.

(2) 8 T. R. 516.

(3) 1 Marshall, 600.

(4) *Richards v. Barton*, 1 Esp. N. P. C. 268. *Turner v. Beaurain*,

MS. case stated in *Sugden's Law of Vendor and Purchaser*, 193.

(5) *Camfield v. Gilbert*, 4 Esp. N. E. C. 221.

The defendant may obtain a particular of the grounds, on which the plaintiff seeks to recover back the deposit : and the plaintiff will, at the trial, be confined to such grounds as are stated in the particular ; but if a particular has not been given, the plaintiff will be at liberty to prove any ground for rescinding the contract. (1)

Particular of  
breaches of  
contract.

A payment of the deposit to the agent, who made the contract with the plaintiff on behalf of the owner of the estate, is a payment to the principal : and proof of such payment will be equivalent to proving, that the money passed into the defendant's hands. (2)

Payment to  
agent.

(1) *Squire v. Tod*, 1 Campb. 293.      (2) *D. of Norfolk v. Worthy*, 1 Camp. 339.

## CHAP. V.

### *Of Evidence in an Action of Assumpsit, for the Use and Occupation of Real Property.*

THE action for use and occupation affords the most convenient remedy for the recovery of rents, where the demise is not by deed. At common law, difficulties frequently occurred in recovering in this form of action ; for wherever there had been a parol demise, upon which a certain rent was reserved, the courts of law looked upon the contract as one respecting the realty, and held that the action of assumpsit, to recover the reserved rent, could not be maintained (1), though they allowed it to be brought on a mere promise to pay a sum of money for the use of the premises. (2) But this difficulty has been removed by the statute 11 G. 2: c. 19. s. 14., which enacts, that, where the agreement is not by deed, the landlord may recover a reasonable satisfaction for the lands or hereditaments, held or occupied by the defendant, in an action on, the

(1) *Roll. Abr.* 7. (O) pl. 1. *Brett v.*      (2) *Dartnall v. Morgan*, *Cro. Jac.*  
*Read*; *Cro. Car.* 343.      598. *Johnson v. May*, 3 *Lev.* 150.

case for the use and occupation; and if, on the trial of such action, any parol demise or agreement (not by deed) shall appear in evidence, reserving a certain rent, the plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the quantum of the damages to be recovered. The statute expressly excepts cases where there has been a demise or agreement by deed, in which cases still, as at common law, the action of assumpsit will not lie. This has been understood as applying only to such deeds as contain words of present demise, or covenants for payment of rent; for if the deed does not amount to an actual demise, but is merely an agreement for a future lease, it will not prevent the plaintiff from recovering in this action. (1)

**Declaration.**

The declaration states generally the nature of the premises, and the use and occupation of the defendant by the permission of the plaintiff; for which occupation the plaintiff seeks to recover a specific sum, or so much as he reasonably deserves. It is not necessary to set forth the demise, or the entry of the lessee, or the time when the rent became due, the action being maintainable in its most general form. Nor is it necessary to state the parish, in which the premises are situated (2); sometimes it would be inconvenient to require such a statement, as the plaintiff might fail, in case of a false description. (3) The locality of the premises, therefore, need not be mentioned; but, as an averment of the local description cannot be rejected as irrelevant, the situation, if described at all, must be truly described, and the proof must correspond with the description. (4)

**Occupation of premises.**

The defendant's occupation of the premises must be proved, or, if he has not himself occupied, an occupation by his tenant; for an occupation by the defendant's tenant is, as far

(1) *Elliott v. Rogers*, 4 Esp. N. P. C. 59.

(2) *King v. Fraser*, 6 East, 548. which was an action of debt for use and occupation.

(3) 6 East, 548. by Lawrence J.

(4) *Guest v. Caumont*, 3 Campb. 235. *Davies v. Edwards*, 3 Maule & Selw. 580. See cases as to variances in the venue, vol. 1. part 1. c. 7. s. 6.

as respects the plaintiff, an occupation by the defendant himself. (1) But if the plaintiff has recognized another person as his tenant, he cannot afterwards charge the defendant. (2)

The plaintiff will have to prove further, that the defendant occupied by his permission, or by the permission of those under whom he claims; and this may be shown by the proof of the demise or agreement, or of former payments of rent. If the occupation is founded upon a written contract, the writing must be produced, as the best evidence; and if, from defect of stamp, it should be inadmissible, the plaintiff will not be allowed to go into general evidence of the holding. (3) But where parol evidence is offered to prove a tenancy, it is not a valid objection that there is some written agreement relative to the holding, unless it should appear, that the agreement was between the parties as landlord and tenant, and that it continued in force to the very time to which the parol evidence applies. (4)

The defendant, who has obtained possession, or holds under the plaintiff, will not be allowed to impeach his title, nor to show, that the title, which he has recognized, has expired. (5) A submission, by the defendant, to a distress for rent, stated in the notice of distress to be due from him as tenant to the distrainer, will be an acknowledgement of the tenancy, and preclude him from disputing the title of his landlord. (6) When his occupation has once commenced, he will be liable to the payment of rent, until the occupation is legally determined; and it will be incumbent on him to prove the determination of his estate and interest, if he resists the payment of rent subsequent to his giving up the possession. If a notice to quit is necessary, and he quits the premises without having given the

(1) Bull v. Sibbs, 8 T. R. 327.

(2) Thomas v. Cook, 2 Barn. & Ald. 119.

(3) R. v. St. Paul's, Bedford, 6 T. R. 452. Hodges v. Drakeford, 1 New Rep. 271.

(4) Doe dem. Wood v. Morris, 12 East, 237.

(5) Cooke v. Loxley, 5 T. R. 4.

Balls v. Westwood, 2 Campb. 11. Phipps v. Sculthorpe, 1 Barn. & Ald. 50.

(6) Panton v. Jones, 3 Campb. 372.

requisite notice, and without the consent of the landlord, the landlord may still consider him as his tenant. (1) But the landlord may dispense with the notice by parol, and if the parties make a parol agreement, the one to deliver up possession before the expiration of his tenancy, and the other to accept it, and no claims should be made for rent accruing after giving up the premises, in such a case the plaintiff would not be entitled to recover rent subsequent to the termination of the occupation. (2)

(1) *Redpath v. Roberts*, 3 Esp. N. P. C. 225.

(2) *Whitehead v. Clifford* 5 Taunt 518.

## CHAP. VI.

### *Of Evidence in Assumpsit on Awards, on an Attorney's Bill, Warranty of a Horse, &c.*

IT is proposed, in the present chapter, to consider the requisite evidence in some other actions of assumpsit: First, of the evidence in assumpsit on awards; Secondly, in assumpsit on an attorney's bill; Thirdly, in assumpsit on the warranty of a horse; Fourthly, in assumpsit on a special contract for goods sold, &c.; Fifthly, of evidence on the common counts in the general indebitatus assumpsit, for goods sold, money paid, &c.

#### 1. Assumpsit on award.

First, of evidence in assumpsit on an award.

The general proofs, in an action upon an award, relate to the submission of the parties to the reference, the award of the arbitrator, and the non-performance by the defendant.

#### Submission.

The general plea of non-assumpsit puts every material averment in issue. First, a mutual submission of all the parties to the reference is to be proved; if written, by the



production and proof of the writing, in the usual manner (1); if unwritten, by the arbitrator, or some other person conusant of the submission. An order of reference, made by a judge in a cause tried before him, may be proved by the original order, or, if the order has been made a rule of court, by proof of such rule (2): the rule, by reciting the order, shows that the court have adopted and acted upon it, and is therefore to be accredited as proof of the original order.

The award is then to be proved. (1) This must be properly stamped, and pursuant to the submission in form as well as in substance. It ought also to agree with the statement on the record in all its qualifications and conditions. An averment, that two arbitrators had appointed a third person as arbitrator, in pursuance of the order of reference, is not proved by a recital in the award, to that effect; nor is it proved by shewing, that the third person signed the award, or acted in any other part of the proceedings as arbitrator. (3) The recital is a mere written statement by the arbitrator, and not legal evidence of the antecedent appointment, against a party charged under the award; and the circumstance, of the third person having acted as arbitrator, is no proof of the right to act in that character.

The averment that the defendant had notice of the award, though commonly made, is entirely unnecessary, the fact of the making of the award being as much within the knowledge of the one party as of the other (4); consequently this averment need not be proved, unless it is expressly provided, that the award should be notified to the parties, in which case the notice must appear to have been regularly given. (5) Nor is proof of a demand of payment necessary, except where the payment is of a collateral sum upon request; as, where the

(1) See vol. 1. part 2. c. 8. s. 2.  
Antram v. Chace, 15 East, 209.

(2) Still v. Halford, 4 Campb. 17.  
by Lord Ellenborough.

(3) Still v. Halford, 4 Campb. 19.

(4) 8 Rep. 92. Cro. Car. 132.  
2 Saund. 62. a. n. (4).

(5) Child v. Horden, 2 Bulstr.  
144.

defendant promised to pay a sum of money on request, for which sum the action was brought, in case he did not perform the award on his part (1); there the averment of a demand must be specially made, and proved. The rule is different in the proceeding by attachment; where, as the process is for a contempt, personal notice of the award, as well as a demand of the money, is always necessary.

If the award direct some act to be done by the plaintiff, previous to that which is required of the defendant, a performance of this precedent act, on the part of the plaintiff, ought to be averred and proved. As to the proof of the defendant's default in not performing the award, where the alleged breach is for not paying a sum of money awarded to the plaintiff, the burthen of proof is with the defendant, who ought to prove the payment, if he can, in discharge of himself.

A submission and award have in some cases been admitted in evidence, in actions founded on the original debt, as an admission on the part of the defendant. In the case of *Keen v. Bathshore* (2), which was an action for work done, with the usual money counts, Lord Ch. Justice Eyre admitted the award of the arbitrator as a statement of accounts between the parties, and an admission of the balance due to the plaintiff. (3) And upon the same principle, in the case of *Kingston v. Phelps* (4), which was an action of assumpsit on a policy of insurance, Lord Kenyon allowed an award on the matters in dispute to be given in evidence.

Non-assump-  
sit.

The defendant may insist at the trial, under the general issue, on any legal objection to the validity of the award, which is apparent in the award itself; and if courts of law have not any jurisdiction over the award, so that there is no

(1) *Birks v. Trippet*, 1 Saund. 33.

(2) 1 Esp. N. P. C. 193.

(3) And see *Daniell v. Pitt*, in 1 vol. p. 100., and other cases there cited.

(4) *Peake*, N. P. C. 228. The

proof of the plaintiff's submission to the reference failed in this case; so that he was obliged to resort to other evidence.

power to make an application for setting it aside, the defendant may show some irregularity by matter extrinsic, such as want of notice of the meeting, or collusion in the arbitrator: but if a court of law has such jurisdiction, (as, where the reference is by rule of court, or order of nisi prius, or where the submission is in writing, and the parties agree to make it a rule of court, under the authority of st. 9 & 10 W. 3. c. 15.) he cannot, in such cases, impeach the award by proof of any extrinsic matter, which would be a ground for an application to set aside the award, and which ought to be brought forward in that specific form within a certain limited time.

Secondly, of the evidence in assumpsit on an attorney's bill. II. Assumpsit on attorney's bill.

No attorney or solicitor can commence or maintain any suit for the recovery of fees, charges, or disbursements at law or in equity, until the expiration of one month, or more, after he has delivered to the party or parties, to be charged therewith, or left for the party or parties at his or their dwelling-house or last place of abode, a bill of such fees, charges, or disbursements, subscribed with his proper hand. (1)

It is unnecessary to enquire here into the construction, which has been put upon the words, "fees, charges, or disbursements at law or in equity;" the cases on that subject having been collected in the treatise on the law of nisi prius. (2) But, in passing, it may be observed, that the statute has received from courts of law the most liberal construction in favour of the client. The points, to be here considered, relate to the delivery and proof of the bill, and to the defendant's liability.

First, as to proof of the delivery of the bill. The intention of the legislature, in requiring a delivery of the bill, was, that Delivery of bill.

(1) St. 2 G. 2. c. 23. s. 23. The hands and names, of all charges concerning suits, before they charged them with the fees.  
 St. 3 Jam. 1. c. 7. required all attorneys and solicitors, to give their clients a true bill, subscribed by their

(2) See Selw. N. P. title Attorney.

the client should have due time to examine the charges, and, if necessary, to take advice upon them. (1) If the bill is delivered to the client himself, it should regularly be left with him; the attorney ought not to take it back again, though the client should acknowledge the debt, and promise to pay. (2) Nor would it be sufficient to prove, that a copy of the bill was shown to the client, and the several charges explained, upon which he admitted the debt; the words of the statute are imperative. (3) If the attorney's clerk, who is supposed to have delivered the bill, is dead, proof of an indorsement on the bill in the handwriting of the clerk, stating, that a copy was on a certain day delivered to the defendant, corroborated by proof that it was the clerk's duty to deliver the bill, and that such an indorsement would regularly be made according to the common course of business in the office, has been very reasonably held to be *prima facie* evidence of the due delivery of the bill. (4)

**At what place.** When the delivery is not to the party, the bill must be left for the party at his dwelling-house or last place of abode: leaving it at the counting-house of the party is not sufficient. (5) The meaning of the words "*last place of abode*" is, the place which appears from the evidence to have been the only known abode of the party at the time of the delivery. (6)

**To whom.** The statute requires the bill to be delivered to the party, or left for the party at his dwelling-house, or last place of abode. It does not expressly require a delivery to the client in person. A personal service, therefore, is not indispensably

(1) 1 H. Bl. 290.

(2) Brooks v. Mason, 1 H. Bl. 290.

(5) Crowder v. Shee, 1 Campb. 437.

(4) Champneys v. Peck, 1 Starkie, N. P. C. 404.

(5) Hill v. Humphreys, 3 Esp. N. P. C. 254. 2 Bos. & Pull. 345. S. C.

(6) Wadson v. Smith, 1 Starkie, N. P. C. 324. The bill was delivered at a place, where the defendant had

lodged, but he had quitted the lodgings about three months before the delivery, and then went to a shopkeeper's in another street. Here the evidence closed; it did not appear, why he went to the latter place, whether on a visit, or as to a place of abode, or in what manner: so that the evidence just fell short of the mark, and the objection failed.

necessary. But a delivery of the bill to an agent, appointed by the party to receive it (1), or to a person appointed to be his attorney in the conduct of the business, in the place of the plaintiff, whom he had dismissed (2), is a delivery to the party within the meaning of the statute. Or if there are several persons, jointly liable in a suit or other matter, and one of them is authorised to act for the others, proof of the delivery of a bill to such acting person will be sufficient as against the rest of the party (3); or if they all jointly employ the same attorney, and act together in the business, it seems to be sufficient to prove a delivery to any one of them, in an action against any other of the parties. (4) But though they may be jointly liable, yet if one of them did not in any manner interfere in the business, and the other undertook the entire direction of it, a delivery to the one, who took no part, would not be sufficient as against the others. (5)

The bill, properly signed, is to be delivered at least one complete month, that is, one lunar month (6), before the commencement of the action. It will not be necessary, for the purpose of showing the commencement of the suit, to prove the issuing of the writ; the *nisi prius* record, which is made up of the term in which the issue is joined, will be *prima facie* evidence of the commencement; and the defendant may, if he can, contradict such evidence by producing a copy of the writ (7), or by proving when the declaration was delivered by the plaintiff. (8) When the record is of a term generally, it relates back to the first day of the term: and if that day would be within a month of the day of the delivery

(1) By Lord Ellenborough, 2 Campb. 277. See also 12 East, 374.

(2) Vincent v. Slaymaker, 12 East, 372, 378.

(3) Finchett v. How & Jarratt, 2 Campb. 277.

(4) Crowder v. Shee, 1 Campb. 437.

(5) Finchett v. How & Jarratt, 2 Campb. 277.

(6) Hurd v. Leach, 5 Esp. N.P.

C. 168. An attorney may set off his bill in an action against him, without delivering it a month before; but he should deliver it early enough to enable the plaintiff to have it taxed before the trial. Martin v. Winder, 1 Doug. 198. in note.

(7) Webb v. Pritchett, 1 Bos. & Pull. 263.

(8) Harris v. Orme, 2 Campb. 497. n.

of the bill, a special memorandum may be inserted, stating the precise day when the bill was filed. (1)

**Proof of bill.**

A notice to the defendant, to produce at the trial the bill delivered, is always a prudent precaution. After proof of such notice, parol evidence of the contents of the bill will be admitted; but parol evidence is not admissible, unless such previous notice has been given. The contents may be proved by a duplicate original, without any previous notice. (2) Palpable errors in the bill, as well as errors in a particular delivered under a Judge's order, may be rectified (3); and all real omissions will be allowed for on the taxation. (4)

If a bill has been delivered, containing, among items for disbursements at law, other items of demand for charges not connected with the profession of an attorney, the plaintiff cannot recover for any part, unless he has complied with the requisites of the statute (5); in such a case, by delivering a bill as attorney, and inserting his whole demand upon his client in a bill containing taxable items among others not taxable, he must be understood to agree, that he would not bring an action upon any part of such demand, until the bill had been regularly delivered in pursuance of the statute. (6) If no part of the bill delivered is taxable, the plaintiff may recover upon it, though it has not been delivered a month before the commencement of the action; as, where the bill relates entirely to conveyancing; for the statute does not apply to such a demand. (7) If the plaintiff has not delivered any bill before the commencement of the action, he may recover on a demand for money paid by him for the use of the defendant, provided the payment was not within the description of "fees, charges, or disbursements at law or in equity," and had no manner of reference to the business of attorney,

(1) *Dodsworth v. Bowen*, 5 T. R. 325.

(2) Vol. 1. part 2. c. 8. s. 2.

(3) *Williams v. Barber*, 4 Taunt. 806. The error was in the date of one of the items. And see as to bill of particulars, vol. 1. p. 189.

(4) *Loveridge v. Botham*, 1 Bos. & Pull. 49.

(5) *Wald v. Crawford*, 2 Starkie, N. P. C. 538. 2 Bos. & Pull. 345. *Burton v. Chatterton*, 3 Barn. & Ald. 486.

(6) 2 Bos. & Pull. 345.

(7) *Buff. N. P.* 145.

although he may also have a demand against him for disbursements at law. (1)

The defendant's liability may be proved by proof of his retainer to the plaintiff, or of his undertaking to pay, or of his admission. Proof of the Judge's order, referring the bill to be taxed, with proof of the defendant's undertaking to pay what should appear to be due, and of the master's allocatur, proves the whole of the plaintiff's case. (2) The Judge's order and the master's allocatur prove the work done and the amount of the charges; the undertaking proves the liability of the defendant. Defendant's liability.

General evidence, as to the work having been done, will be sufficient, where the item, specifying the work, is taxable. But if the bill is not taxable, as where it is entirely for conveying, or entirely for payments by the plaintiff without the slightest reference to his character as attorney, or if any particular items in the bill are not taxable (3), there the payments and the reasonableness of the charges must be proved as in other cases. The plaintiff need not produce evidence at the trial, as to the reasonableness of his charges on any taxable items in the bill; the bill having been delivered a full month before the commencement of the action, and the defendant having delayed all that time to get it taxed, he will not afterwards be allowed to dispute the amount of the items at the trial of the cause (4); though he may enquire whether the particulars of the business have been done, or, if done, on what specific terms. Nor is it a good defence, to show negligence in the plaintiff in transacting the business, for which he makes the charge; not, at least, unless the negligence has been so gross. Work and charges.

(1) *Mowbray v. Fleming*, 11 East, 285. The plaintiff in this case delivered a bill of particulars of his demand under a Judge's order.

(2) *Ley v. Jones*, 2 Campb. 496. By the practice of the King's Bench and Common Pleas, the undertaking is signed by the defendant or his attorney in the Judge's book, previous

to an order for taxation; *Tidd*, Pr. 326. As to the form in the Exchequer, see *Tidd*, Appx. 154.

(3) As to what is taxable, see 1 *Tidd*, Pr. 320, 321.

(4) *Williams v. Frith*, and *Hooper v. Till*, 1 Doug. 198. *Anderson v. May*, 2 Bos. & Pull. 237.

that the defendant has in consequence lost all possibility of benefit from the work, and received not the least degree of beneficial service. (1)

III. Assumpsit  
on warranty of  
a horse.

Thirdly, of the evidence in assumpsit on the warranty of a horse.

If a person purchase a horse warranted sound, and it afterwards turns out, that the horse was unsound at the time of the warranty, he may bring an action against the seller for the breach of the warranty; in which action he will be entitled to recover the difference between the value of such a horse perfectly sound, and the value of the identical horse, as it was at the time of the warranty; and this action will lie, though he has kept the horse without offering to return it, (provided there is no stipulation to the contrary,) and though he has not given the seller any notice of unsoundness (2); the omission to give such notice will be a strong presumption against the buyer, that the horse at the time of the sale had not the defect complained of, and will make the proof on his part much more difficult (3), but it will not destroy his right of action.

The question of warranty cannot be tried in an action for money had and received; where the warranty is one of the facts to be tried, the action must be special, upon the warranty itself. If the buyer, indeed, by the terms of the contract, has a power to rescind the contract by his own act, and does that act for the purpose of rescinding it, (as, where, together with the warranty, there is a power given to the buyer to return the horse within a certain time, if he disapproves of

(1) *Temple v. McLachlan*, 2 New Rep. 136. *Farnsworth v. Garrard*, 1 Campb. 38.

(2) *Felder v. Starkie*, 1 H. Bl. 19. *Adam v. Richards*, 2 H. Bl. 573. *Curtis v. Hannay*, 5 Esp. N. P. C. 82. On the breach of the warranty, the buyer may immediately sell the horse, and recover the residue of

the price in damages, (that is, the difference between the price paid and the value of the horse in its unsound state); by *Mansfield C. J. Caswell v. Coare*, 1 Taunt. 568. and see 1 H. Black 19. The cases on this subject are collected in Selw. N. P. under title *Warranty of Horses*.

(3) 1 H. Bl. 19.



it, and he accordingly offers to return it to the seller, who refuses to receive it,) there the contract is determined by the single act of the buyer, and the buyer will be entitled to recover back the whole purchase-money in an action for money had and received. (1)

In this action upon the warranty, the sale of the horse and Proofs. an express warranty must be proved: the notion, of a high price being tantamount to a warranty, has been long exploded. A written receipt for the price, containing the warranty, is admissible in evidence, stamped as a common receipt, without an agreement-stamp. (2) There must also be positive proof of the unsoundness at the time of the warranty; a suspicion of unsoundness is not sufficient. (3) As the breach of the warranty is the foundation of the action, the fact of the defendant having known of the unsoundness, at the time of the warranty, need not be averred, and, if averred, need not be proved. (4)

A charge for keeping the horse is commonly inserted in the declaration; to recover damages on this account, the plaintiff ought to show, that he offered to return the horse on discovering its unsoundness; otherwise, he treats it as his own property, and ought to maintain it at his own expense. (5)

If A. sell a horse with a warranty of soundness to B., Witness. who shortly afterwards sells the same horse with a similar warranty to C., and C. brings an action against B. for a breach of the warranty, on the trial of this action A. is not a competent witness for B. to prove the soundness; for if B. fail in the action, after giving notice of it to A., he may sue A. for the

(1) See the cases, *Power v. Wells*, Cowp. 818. *Weston v. Downes*, 1 Doug. 35. *Towers v. Barrett*, 1 T.R. 133. *Payne v. Whale*, 7 East, 274.

(2) *Skrine v. Elmore*, 2 Campb. 407.

(3) *Eaves v. Dixon*, 2 Taunt. 343.

(4) *Williamson v. Allison*, 2 East, 446.

(5) *Caswell v. Coare*, 2 Campb. 83. 1 Taunt. 566. S.C.

costs, as special damages, having been induced by A.'s warranty to warrant the horse to C. (1)

IV. Special  
assumpsit for  
sale of goods,  
&c.

Fourthly, Of the evidence in assumpsit on a special contract for goods sold, &c.

The averments in the declaration in an action on a special assumpsit will vary with the nature of the contract. It will be necessary, in all cases, to state the consideration, on which the contract is founded, the contract itself, and the breach of the contract by the defendant. In some cases, it will be necessary to aver, in addition to such general statements, a performance of all that was requisite on the part of the plaintiff, or a readiness and offer to perform, or a legal excuse for the non-performance. An averment also, that the defendant had notice of a fact previously stated, or that he was requested to perform his part of the contract, is frequently necessary. The propriety of introducing such averments must obviously depend upon the nature of the specific contract, which is the subject of the action.

Proof of con-  
tract.

Several cases have been mentioned, in which the agreement is required to be in writing (2); and in all those cases, if the form of the issue is such as to make it necessary to give evidence of the agreement, a written agreement must be regularly proved. The rule is the same in other cases, where the contracting parties, however unnecessarily, have contracted in writing. The contract is sometimes admitted on the record, as, by a judgment by default, or by payment of money into court, or by confining the issue to some collateral point; and such admissions will dispense with all proof of the agreement. (3) But the general rule is, that a written agreement,

(1) *Lewis v. Peake*, 7 Taunt. 155., an action by C. against B. on the warranty, and to recover the costs of the former suit.

(2) See *supra*, p. 90. And as to the

proof of agreements, see vol. 1. part 2. c. 8. s. 2.

(3) As to the effect of judgment by default, see vol. 1 p. 184.; and of payment of money into court, vol. 1. p. 185.

if it must be proved at all, can only be proved by writing, or by secondary evidence of the writing, where secondary evidence is allowed. (1)

Another rule, to be observed, is, that where a written contract must be proved, the writing ought to be properly stamped, if any stamp is necessary. There are several exemptions in favour of agreements, which have been already noticed: the principal of these, which applies to the subject now under discussion, is the exemption of any "memorandum, letter, or agreement, made for, or relating to, the sale of any goods, wares, or merchandize." (2)

The contract proved ought to agree, in substance and effect, with the contract set forth on the record. They need not be co-extensive: the written contract generally comprises much more than is expressed in the pleadings, for it is sufficient to state only so much of the contract, as shews the particular promise, upon which the plaintiff grounds his action. (3) But, though not co-extensive, they must be consistent; in other words, there must be no contrariety between the statement and the proof, with respect to any qualification or condition annexed to the contract. (4) An unwritten contract may be proved in various ways: as, by proof of the defendant's admission, by an agent employed to make the contract, or by some person present when the contract was made.

Immaterial averments, which might be expunged from the record without affecting the plaintiff's right of action, need not be proved. (5) In the case of an averment of a promise to pay a sum of money on request, in consideration of money lent, goods sold, &c. where the consideration of the promise is not collateral, but founded on that part of the con-

Proof of averments.

(1) Upon this subject, see vol. 1. part 2. c. 8. s. 2.

(2) On this exemption, see vol. 1. part 2. c. 9.

(3) 4 Taunt. 287.

(4) Wildman v. Glossop, 1 Barn. & Ald. 12. And see, as to variances in the proof of contracts, 1 vol. p. 208.

(5) See vol. 1. p. 205.

tract, which is to be performed by the defendant, the request need neither be averred, nor proved; the bringing of the action being considered a sufficient demand. But all material averments must be proved; as, where the performance of the contract by the defendant is to depend on the previous performance of something by the plaintiff, or where the performance on both sides is to take effect at the same time, the plaintiff's performance of his part, or his legal excuse for the non-performance, is to be proved substantially as averred on the record: for it is an universal principle, applicable to every sale of property, that no person shall call upon another to perform his part of a contract, until he himself has performed all that he stipulated to do, as the consideration of the other's promises (1); or if he has not actually performed it, he must show, that he was ready to perform, and that the performance has been prevented by the neglect and default of the other party. (2)

Though exact certainty is not necessary, when a thing is alleged only as an inducement to other matter (3), yet if the averment in the introductory part is material, and cannot be rejected as surplusage, it ought to be proved precisely as alleged. (4) The cases, which relate to the necessity of proving particular averments, only distinguish between that which is material, and that which is impertinent, but make no distinction between that which is inducement, and that which is the immediate cause of action. (5)

V. Assumpsit  
on the com-  
mon counts.

Fifthly, of the evidence in assumpsit on the common counts.

The general rule as to the power of resorting to the common counts, in cases where there has been a special agreement, is thus laid down by Lord Ch. Justice Mansfield in the case of *Cooke v. Munstone*: "Where a party declares on a

(1) 8 T. R. 374.

(2) *Jones v. Barkley*, 2 Doug. 694.

(3) *Com. Dig. Pleading*. (C. 31.)

(4) See *Turner v. Eyles*, 3 Bos. &

Pull. 463.; stated in another part of this volume.

(5) *By-Chambre J.* 3 Bos. & Pull. 465.

special contract, seeking to recover thereon, but fails altogether in his right so to do, he may recover on a general count, if the case be such, that, supposing there had been no special contract, he might still have recovered for money paid, or for work and labour done: thus, in the case of a plaintiff suing a defendant, as having built a house for him according to agreement, if he fail to prove that he has built it according to agreement, he may still recover for his work and labour." (1) But if the special contract has not been rescinded, and still remains open and operative, the plaintiff cannot recover on the general counts, if he fail in the proof of the special contract. (2) It frequently happens, that the work, which is the subject of the contract, is enlarged, or some alterations are made in the plan, with the consent of the contracting parties; the true principle, with respect to such alterations, appears to be, that the contract is to be used as the measure of payment, so far as it has been acted upon by the parties, and that all the work out of the contract is to be paid for according to the usual rate of charging (3); in other words, the plaintiff is to be paid up to the extent of the estimate, according to the estimated prices, and beyond the estimate he is to be compensated on the footing of a *quantum meruit*. (4) And if the plan specified in the contract has been so entirely abandoned by the parties, that it is impossible to trace the contract, or to ascertain to what part of the work it can be applied, in such case the workman will be permitted to charge for the whole work by measure and value, as if no contract had existed. (5)

The plaintiff may recover as much as he proves to be due to him, within the sum specified in the declaration, upon the

1. *Indeb. Ass. for goods sold and delivered.*

(1) 1 New Rep. 555. See *Ellis v. Hamlen*, a nisi prius case, before Mansfield C. J. 1810. 3 Taunt. 52.

(2) *Hulle v. Heightman*, 2 East, 145. And see 1 Selw. N.P. title *Assumpsit*. II. The rescinding of the contract must be a rescinding in toto, so that the parties may be restored to the same situation, in which

they were before placed. *Hunt v. Silk*, 5 East, 449.

(3) *Pepper v. Burland*, Peake, N. P. C. 102.

(4) *Robson v. Godfrey*, Holt, N. P. C. 236.

(5) By Lord Kenyon, Peake, N. P. C. 103.

count for goods sold, for work and labour done, &c., although there may have been no specific contract between the parties. There must be some evidence, however, in this case, from which a contract may be presumed, and proof also of the delivery of the goods. A delivery to a third person, by order of the buyer, is a delivery to the buyer, and the buyer may be sued for goods sold and delivered to himself; though in practice it is generally stated, that the goods were delivered to such third person at the request of the buyer. (1) A delivery to a servant, who has been employed by his master to take up goods for him on credit, will make the master answerable for goods subsequently supplied, although he may have given his servant money for payment, which the servant neglected to pay (2); but, if he has not been employed in any instance to buy on credit, and has always received money before-hand, to pay as he bought, the master will not be answerable. (3) A delivery also to a carrier appointed by the defendant, or, if none has been appointed, according to the most usual and convenient mode, will entitle the plaintiff to recover, although there is no proof of the goods having come into the defendant's possession. (4)

**Competency  
of witness.**

In an action for goods delivered by the defendant's order to a third person, that person is not competent to prove the credit given to the defendant; for he may have misled the plaintiff by misrepresenting the conduct of the defendant, and, if that were detected, would still be liable to the plaintiff. (5) If the plaintiff has proved a sale of goods to the defendant and another person, that person is not competent for the defendant, to prove that the goods were sold to himself alone, and that

(1) By the Court in *Bull v. Stubs*, 8 T. R. 327, an action for use and occupation against the defendant, to whom the plaintiff agreed to let the premises, and who afterwards permitted a third person to occupy them. See *Ross v. Noel*, Bull. N. P. 156.

(2) 1 Show. 95. by Lord Holt. *Hazard v. Treadwell*, 1 Str. 506. *Rusby v. Scarlett*, 5 Esp. N. P. C. 76.

(3) *Pearce v. Rogers*, 5 Esp. N. P. C. 214. The cases on this subject are collected in *Paley's Treatise on the Law of Principal and Agent*, ch. 3. p. 1. s. 2. and in 2 Selw. N. P. tit. Master and Servant, II.

(4) *Supra*, p. 97. See the late case of *Anderson v. Hodgson*, in the Court of Exchequer, 5 Price, 630.

(5) *Wright v. Wardle*, 2 Campb. 200. by Lord Ellenborough.

the defendant was only concerned as his servant. (1) The competency of servants and agents, as to the proof of payment or of the delivery of goods, has been mentioned in another place. (2)

The defendant will be allowed, in answer to the whole demand, or in abatement of the damages, to give evidence of the bad quality of the articles supplied, unless he has precluded himself from such a defence, by neglecting to give to the seller a reasonable notice of their inferiority; and this evidence will be admitted, whether the goods have been sold at a stipulated price, or whether the plaintiff proceed upon the *quantum valebant*. (3) Upon the same principle, in answer to the plaintiff's demand on a *quantum meruit* for work and labour done, the defendant may prove the badness of the work, and will not be obliged to resort to a cross action to recover damages for the plaintiff's negligence (4); he may prove that the work was executed in such a manner, as to be of no value at all to him, or not to be of the value charged. (5) Even, when there has been a specific sum agreed upon for the work, the defendant will be let into such a defence, if the plaintiff has had notice of the kind of defence, intended to be set up against his demand. (6)

Badness of articles.

Where the defence is, that the action has been commenced before the expiration of the credit, on which the goods were bought, this will be proved *prima facie* by proof of the issuing of the writ at a time when the credit had not expired; on the other side, such evidence will be answered, by shewing, by means of a special memorandum on the bill, that the bill

Credit not expired.

(1) Goodacre v. Breame, Peake, N. P. C. 174.

(2) Vol. 1. p. 128.

(3) Fisher v. Sarpuda, 1 Campb. 191., before Lord Ellenborough. King v. Boston, before Lord Kenyon, 7 East, 481. in note.

(4) Farnsworth v. Garrard, 1 Campb. 58. Basten v. Butter, 7 East, 479.

(5) 7 East, 485.

(6) Basten v. Butter, 7 East, 484.

was filed subsequent to the expiration (1); the issuing of the writ is merely process to bring the party into court, but, with respect to the cause of action, the Court looks to the filing of the bill as the commencement of the suit. Or if the defendant insist, in support of such a defence, that the record, being dated of a term generally, is to be referred to the first day of the term, which would be before the expiration of the credit; the plaintiff, in reply, may prove the issuing of the writ on a day subsequent to the cause of action. (2)

2. Indeb. Ass.  
for tithes bar-  
gained and  
sold.

In an action brought by the owner of tithes, against an occupier of lands, to recover the value of tithes, retained by him under a parol agreement or composition, the particulars, to be proved under the general issue, are, the occupation of the defendant, the agreement between the parties, and the retaining of the tithes by the defendant. Enough has already been said respecting the proof of agreements in general. Proof of the defendant having acknowledged, that he agreed to pay the plaintiff a certain sum for the tithes, will be sufficient evidence of the agreement: or an agreement may be properly inferred from the fact of his having before retained the tithes, for which he paid the plaintiff. If an express agreement is proved, that the defendant shall pay a certain price for certain tithes, this is an exact measure of their value, and of the damages to be recovered: but if there is no proof of an express agreement as to the price, and nothing in the nature of the transaction, from which an agreement for the price can be inferred, evidence of the value of the tithes retained will manifestly be necessary.

Defence.

As this action is founded on a contract, express or implied, between the parties, if the defendant can shew, that the compo-

(1) Bull. N. P. 157. *Swancott v. Westgarth*, 4 East, 75. In this case, the bill was produced, in the first instance, with the special memorandum upon it; the defendant, in an-

swer, proved the issuing of the writ; and on this evidence, the defendant recovered a verdict; but the Court of K. B. directed a new trial.

(2) *Rhodes v. Gibbs*, 5 Esp. 163.



sition has been regularly determined, so that he would be obliged to set out the tithes in the usual manner, this will be a good defence to the action; for then, there is no subsisting agreement respecting the tithes, for the value of which the action is brought. But the defendant will not be allowed to dispute the plaintiff's title, as rector or vicar; as, by shewing that his presentation was *simoniacal* (1); or that he neglected to declare his assent to the Book of Common-prayer, as required by the act of uniformity: for having entered into an agreement with the plaintiff for the retaining of the tithes, and having had the full benefit on his side, he can not in justice exclude the party on the other side from his share under the contract.

The plaintiff may recover, upon a count for money lent, the amount of a promissory-note given to him by the defendant; the note being evidence of a loan. (2) A bill of exchange also, drawn by the defendant, and proved to have been paid by the plaintiff, as acceptor, for his accommodation, is evidence to the same effect; or, without proof of actual payment, if it is shown, that the bill has been in circulation after the plaintiff's acceptance, it may be reasonably presumed, that the bill, produced in evidence by the plaintiff, returned to his hands in consequence of payment by him; but the mere production of the bill, without proof of circulation, affords not the least presumption of payment. (3) Nor can payment be presumed from a receipt of the amount, indorsed upon the bill, unless the receipt is proved to be the hand-writing of the defendant, or of some person authorised to receive payment. (4) A bill produced by the *drawer*, with an indorsement of a receipt upon it, imports that it has been paid by the *acceptor*, not by the *drawer*. (5) The fact of payment of a sum of money by A. B. to C. D. may be proved by a draft drawn by him

5. Indeb. Ass.  
for money lent.

(1) *Brooksby v. Watts*, 6 Taunt. 535. Such a defence is not allowed, in an action for use and occupation, brought by the rector against his lessee of the glebe. *Cook v. Loxley*, 5 T. R. 4.

(2) See ante, p. 12.

(3) *Pfiel v. Vanbatenberg*, 2 Campb. 439.

(4) *Ib.*

(5) *Scholey v. Walsby, Peake, N. P. C. 25.* See ante, p. 34.

on his bankers in favour of C. D., and indorsed by C. D., which draft the bankers have paid. (1)

4. Indeb. Ass.  
on account  
stated.

The plaintiff will not be obliged, in support of the count for an account stated, to give evidence of the several items constituting the account. (2) An acknowledgement by the defendant, of a debt due upon any account, or an admission of a debt upon a single article, will be sufficient to enable the plaintiff to recover. (3) On the other hand, it will be open to the defendant to dispute the charges in the several items; for though an account stated, strictly speaking, is an agreement by both parties, that all the articles are true, and formerly this was held to be conclusive, yet a greater latitude has of late prevailed, in order to remedy the errors, which may have crept into the account, in surcharging the items. (4) If the defendant account with the plaintiff, as invested with a certain character, and receive credit from him as such, he thereby recognises the title of the person with whom he has accounted, and cannot afterwards object to the plaintiff's recovering upon this general count (5), though the plaintiff might not be able to recover on a special count, in consequence of the defective proof of his title.

Non-assump-  
sit.

The defendant, under the general issue of non-assumpsit, may give in evidence any thing which shews, that the plaintiff at the time of the commencement of the suit, had not a good cause of action, or that nothing is due (6), as, performance, or payment; or may shew a release (7), or accord and satisfaction (8), or discharge before breach (9), as a legal excuse for the non-performance; or that the contract was dif-

(1) *Egg v. Barnett*, 3 Esp. 197.

(2) *Bartlett v. Emery*, 1 T. R. 42. n. Bull. N. P. 129.

(3) *Knowles v. Michel*, 13 East, 249. *Highmore v. Primrose*, 5 Maule & Selw. 65.

(4) By Lord Mansfield, *Trueman v. Hurst*, 1 T. R. 42.

(5) *Peacock v. Harris*, 10 East, 104.

(6) Bull, N. P. 152. 4 Taunt. 165.

(7) Bull N. P. ib. *Hawley v.*

*Peacock*, 2 Campb. 558. 4 Taunt. 165. *Miller v. Aris*, 5 Esp. N. P. C.

254.

(8) *Paramore v. Johnson*, 1 Lord Raym. 566. 12 Mod. 376. S. C. *Huxham v. Smith*, 2 Campb. 19. So also

in an action for slanderous words, *Lane v. Applegate*, 1 Starkie, N. P.

C. 97.

(9) 12 Mod. 538. S. P. admitted 1 Mod. 262.

ferent from that stated (as, that it was made with the plaintiff and other persons not named in the action (1), or with one of the plaintiffs alone (2); or may disaffirm the contract by shewing, that the plaintiff, who sues as a feme sole, was married at the time of the contract; or that the defendant, who is sued as a feme sole, was then married; or that the defendant, who is sued as a married woman, was, at the time of the delivery of the goods, married to another man, her first husband, who is still alive (3); or may avoid the contract by shewing that it was usurious (4), or founded on a gaming or other illegal transaction (5), or that the defendant was an infant at the time of making the promise (6), or that he was made to sign the supposed written agreement in such a state of intoxication as not to know what he did. (7)

But the defendant cannot, under the plea of *non assumpsit*, shew any matter, that would not go to the gist of the action, but merely to discharge it, as the statute of limitations (8); and though it should appear on the face of the declaration, that the cause of action did not arise within six years before the commencement of the action, yet the defendant can only take advantage of this by pleading the statute. Nor can the defendant shew a payment of the debt, after the action brought, and that the plaintiff then gave him a receipt for the debt and also for costs in the action; except for the purpose of lowering the damages to mere nominal damages; but with this view, the evidence is admissible. (9) "The Court of King's Bench (said Ch. Justice Gibbs, in the case referred to) have suffered what has passed, between suing out of the writ and filing the

(1) *Leglise v. Champante*, 2 Str. 820.  
*Jell v. Douglas*, 4 Barn. & Ald. 374.  
 The latter of these two cases was an action for goods sold by the plaintiff; but it appeared, at the trial, that the goods had been sold by the plaintiff and a deceased partner; and the plaintiff failed on account of this variance.

(2) *Wilsford v. Wood*, 1 Esp. N.P.C. 183. See, as to variance in proof of contract, vol. 1, 208.

(3) *Cowley v. Robertson and wife*, 3 Campb. 438.

(4) 1 Str. 498. Bull. N. P. 152.

(5) 1 Lord Raym. 89.

(6) 1 Salk. 279. Bull. N. P. 152.  
*Gilb. Ev.* 163. *Howlett v. Haswell*, 4 Campb. 118.

(7) *Pitt v. Smith*, 3 Campb. 33.

(8) Bull. N. P. 152.

(9) *Holland v. Jourdine*, Holt, N.P.C. 6.

declaration, to be given in evidence without pleading it. But the payment of the debt and costs, which arises after action brought, should be introduced by plea. The plaintiff, however, can only claim nominal damages."

The defendant, will not be allowed to prove, under the general issue, that the contract was not with himself alone, as stated in the declaration, but jointly with other persons (1); for proof, that another contracted, is not evidence that the defendant himself did not contract; and where several persons make a joint contract, each is liable for the whole, although the contract be joint. Such an objection can only avail, when the fact is pleaded in abatement. And although it should appear on the evidence, produced on the part of the plaintiff, that other persons are liable, as joint contractors with the defendant, this is no variance, and the plaintiff will be entitled to recover. (2)

(1) *Rice v. Shute*, 5 Burr. 2611. *Abbott v. Smith*, 2 Blac. Rep. 946. *Cowp.* 832. *Richards v. Heather*, 1 Barn. & Ald. 39. Here the defendant was surviving partner, and though he was not so charged, the plaintiff recovered; and *Spalding v. Mure*, 6 T. R. 365, was overruled, as to this point.

(2) *Germain v. Frederick*, and *Evans v. Lewis*, 1 Saund. 291. *c. d.* in

note. The last case was an action against defendant as *drawer* of a bill, which appeared in evidence to have been drawn by him and another jointly. See also *Mountstephen v. Brooke*, 1 Barn. & Ald. 224. which differs only in being an action against an *acceptor*.

## CHAP. VII.

### *Of Evidence in an Action of Covenant.*

**I**N treating of the action of covenant, which is next to be considered, there is not much to say on the subject of evidence. Some of the principal points, particularly those respecting the mode of proving the execution of deeds, have been already mentioned in another place. (1) It has also been

(1) See vol. 1. part 2. c. 8. s. 2.

shewn, in what cases a variance between the deed and the allegation in the pleadings will be fatal; and upon which of the litigating parties the proof of the issue will lie, whether on the plaintiff or on the defendant.

The facts, to be proved by either party, will vary in every case with the nature and form of the issue. All averments, which are not put in issue, are admitted to be true. If the defendant plead, that the deed is not his deed, the plaintiff must prove its execution by the defendant; if he plead some other plea, and does not deny that the deed is his, he admits the execution with respect to all such particulars of the deed, as are exhibited on the record; but he does not admit the execution beyond that extent, and the plaintiff cannot avail himself of other particulars in the deeds besides those specified in the declaration, without proving the execution in the regular course. (1)

Admission on record.

The plea of *non est factum* puts in issue this point, whether the defendant has executed a deed, of which the legal effect and substance are correctly stated in the declaration. The defendant, therefore, under this plea, may take advantage of any variance, between the legal effect of the deed produced, and that specified on the record. If a covenant, for instance, is set out as general and absolute, but, on the reading of the deed in evidence, the covenant appears to be subject to an exception or qualification, the statement on the record is untrue in point of substance and effect, and the plaintiff will be nonsuited, or the verdict must pass for the defendant. (2) Under the plea of *non est factum*, pleaded together with a notice of set-off, the defendant cannot be allowed to produce evidence on the set-off. (3) The plea of *non est factum* will be further considered, in treating of the action of debt.

Non est factum.

(1) *Williams v. Sills*, 2 Campb. 519.

(3) *Oldenshaw v. Thompson*, 5

(2) *Sands v. Ledger*, 2 L. Raym. Maule & Selw. 164.

92. *Howell v. Richards*, 11 East, 33.

Action against  
assignee.

Actions of covenant are often brought by or against the assignees of the reversion, or the assignees of a term. If the action is against the defendant as assignee of the reversion, and the issue is, whether the reversion vested in the defendant by assignment, it will be sufficient to prove, that the estate came to him, by descent, as heir at law to the lessor; for the substance of the issue is, whether the defendant is clothed with such a character, as will make him liable on the covenant; and, if the estate vest in him, whether as assignee or as heir at law, he will be equally liable. (1) And when the action is brought against the defendant as assignee of a term, and the issue is on the assignment, it will be enough for the plaintiff to give general evidence, from which an assignment may be inferred; as, that the defendant is in possession, or has paid rent. Payment of rent by the defendant to the plaintiff, when the defendant has been let into possession by the original lessee, is *prima facie* evidence of the assignment of the whole term. But the defendant is at liberty to show, that he is not such assignee, but only under-tenant to the lessee; and if he is charged as assignee of the whole of the lessee's estate and interest, when in fact he is assignee of a part only, this is a fatal variance. (2)

Proof confined  
to the issue.

The examples, just mentioned, illustrate this general rule, that the substance of the issue must be proved, and that this is all which needs be proved. One or two instances may be cited in illustration of another rule, namely, that evidence is to be confined to those points only which are at issue. Suppose the issue joined between the parties to be, whether the plaintiff had on a certain day completed some houses, which he covenanted to build, proof of his having completed them before some later day, to which the parties afterwards agreed by parol to enlarge the time, will not support the issue (3),

(1) *Derisley v. Custance*, 4 T. R. 75. not maintain an action of covenant for rent against an under-tenant.  
(2) *Hare v. Cator*, Cowp. 766. (3) *Littler v. Holland*, 3 T. R. 590.  
The case of *Holford v. Hatch*, 1 Doug. 182., determined that the lessor can-

and therefore is not admissible; the plaintiff is bound to prove the issue as laid, otherwise the defendant has not any notice of what he is called upon to answer. So, where the breach assigned is, "that the defendant has not used a farm in a husband-like manner, but on the contrary has committed waste," to which the defendant pleads, "that he has not committed waste, but used the farm in a good and husband-like manner," and the issue is taken upon this, here the plaintiff cannot give evidence of any unhusband-like treatment of the farm, not amounting to waste (1); for though such evidence would be admissible on the former words of the breach, yet the subsequent part, by narrowing the issue to the point of waste, excludes all particulars not within the meaning of that term.

In an action against a tenant for the mismanagement of his farm, the defendant's under-tenant, who is in possession of the farm, is competent, on the part of the defendant, to speak as to the proper management of the premises. (2) And where the point in issue is, whether the owner of the property, whose title is admitted by both parties, demised the premises to the plaintiff before he demised them to a third person, the owner himself is not an incompetent witness to prove that fact, however strong his bias may be to prefer the one tenant to the other. (3)

(1) *Harris v. Mantle*, 3 T. R. 307.(3) *Bell v. Harwood*, 3. T. R. 309.(2) *Wishaw v. Barnes*, 1 Campb. See vol. 1., p. 66.  
341.

## CHAP. VIII.

*Of Evidence in an Action of Debt.*

IN treating of the action of covenant so much has been said, which is equally applicable to the action of debt, that very little remains to be noticed in this place. It would be an endless task to go minutely through the various cases in

which the action of debt may be brought, especially as those in most frequent use have been so fully treated of in the Abridgment of the Law of Nisi Prius. (1) The plan of the present chapter will be, first, to consider the proofs in this action with reference to some of the most general pleas, such as, *non est factum*, *solvit ad diem*, and *nil debet*; and then to advert shortly to the necessary proofs, when the action is brought on a penal statute.

First, as to the pleas, *non est factum*, *solvit ad diem*, and *nil debet*.

Non est  
factum.

The plea of *non est factum*, pleaded to an action on a bond or other deed, puts in issue the execution of the deed, upon which the action is brought; and the plaintiff in support of this issue, the proof of which lies upon him, will have to prove, that the deed in question was executed by the defendant. It will not be sufficient for the witness to prove, that a person of the same name as the defendant executed the deed; some proof will be necessary, that the person who executed, not merely bears the defendant's name, but is the defendant himself. (2) Such additional proof may be supplied by proving the signature to be the defendant's hand-writing; and the defendant's attorney is as competent, as any other witness, to prove this fact. (3)

If an action is brought upon a bond against one obligor alone, who pleads *non est factum*, the plaintiff may maintain his action, notwithstanding that there appears, on the production of the bond, to be a joint obligor (4); and although the bond is declared upon as the joint bond of the defendant and of two other persons, it will be sufficient to prove the execution by the defendant alone. (5) The plea of *non est*

(1) Selwyn's Ni. Pri. tit. Debt. note. South v. Tanner, 2 Taunt. 254.  
(2) Bull. N. P. 171. See vol. 1. part 2. c. 8. s. 2.

(3) See vol. 1. p. 143.

(4) Whelpdale's case, 5 Rep. 119.  
Cabell v. Vaughan, 1 Saund. 291.  
Gaulton v. Chaliner, 1 Saund. 291.

(5) Middleton v. Sandford, 4 Campb. 34. — The bond, in this case, was the joint and several bond of the obligors, and an objection was taken on the ground of a variance, but overruled by Mr. Justice Dampier.



*factum* puts in issue, whether it be the defendant's deed at the time of pleading. It may therefore be proved, under this issue, that the party was incompetent to make a deed, or that the delivery of the writing was absolutely void as an execution; thus, it may be shown, that the defendant was at the time of the delivery a lunatic (1); or that he was blind, or unlettered and unable to read, and that the deed was misread to him (2); or that he was made to sign it, when so drunk as not to know what he did (3); or that the defendant was a married woman. (4) Or it may be shown, that the deed was delivered to a stranger, as an escrow on a condition not performed. (5) Or the defendant may take advantage of a material variance between those parts, which are set out on the record as parts of the deed, and the deed produced. (6) Thus, if any material part of the same integral covenant is omitted, which varies the sense and meaning of the other part declared on, proof of such variance will negative the fact of its being the deed of the defendant. (7)

For the same reason the defendant may show, that, after the delivery of the deed, and before the time of bringing the action, the deed has been altered in a material part by the party, for whose benefit the deed was made, by some addition, or rasure, or interlineation, &c.; for then, at the time of pleading, it was not the defendant's deed, but absolutely void. (8) Formerly the rule was, that a material alteration would vitiate a deed, whether it had been made by the party himself, or by a stranger, without his privity (9); but now, it seems, an alter-

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| (1) Yates v. Bohen, 2 Str. 1104.   | Stoytes v. Pearson, 4 Esp. N. P. C. 255.                        |
| (2) Thorowgood's case, 2 Rep. 9.   | (6) As to variances, see vol. 1. p. 212.                        |
| 11 Rep. 27. b. 28. a. 12 Rep. 90.  | (7) 11 East, 626. by Lord Ellenborough.                         |
| Gilb. Ev. 145.   | (8) 5 Rep. 119 b. Pigot's case, 11 Rep. 27. Sheph. Touchst. 71. |
| (3) Bull. N. P. 172. Pitt v Smith, 3 Campb. 34.  | Powell v. Duff, 3 Campb. 181.                                   |
| (4) Anon. C. 12 Mod. 609. Lambert v. Atkins, 2 Campb. 272. Bull. N. P. 172. Gilb. Ev. 144. | (9) Pigot's case, 11 Rep. 27. a.                                |
| (5) Whelpdale's case, 5 Rep. 119. b. Co. Lit. 36. a. Bull. N. P. 172.                      |   |

ation by a stranger, without the privity of the party, would not have such an effect. (1)

The defendant, under the general plea of *non est factum*, cannot prove payment, or give in evidence a release, or accord and satisfaction; and if the deed is merely voidable, (as, by reason of his infancy, or for duress of his person,) he may plead such matter, and so avoid the deed; but cannot give it in evidence under the plea of *non est factum*, for, at the time of pleading, it had not been avoided, and was his deed. (2) Even in cases, where it is enacted by the legislature, that the deed shall be void, (as, by stat. 9 Ann. c. 14. s. 1. for gaming; by stat. 5. 6 Ed. 6. c. 16. s. 2, 3. for sale of office; by 12 Ann. st. 2. c. 12. s. 2. for simony; and by stat. 13 Eliz. c. 8. for usury,) the defendant cannot take advantage of this under the plea of *non est factum*, but ought to plead the special matter. (3) And it is a general rule, where the consideration of the deed is illegal, (whether by statute or at common law,) that the defendant may take advantage of it by pleading the special matter; but cannot give it in evidence under the plea of *non est factum*. (4)

Breaches  
assigned.

Where breaches of covenants are assigned on the record, (as they may be, under the statute 8 & 9 W. 3. c. 11. s. 8.) the plaintiff must be prepared, on the trial of the issues, to prove the breaches as suggested.\* And if the condition of a bond is not set out in the pleadings, but suggested only on the roll after judgment on demurrer, the plaintiff ought also to prove, on the execution of a writ of enquiry to assess

(1) See *Henfrey v. Bromley*, 6 East, 311. 9 East, 351. As to the effect of alterations of policies of insurance, after subscription; see vol. 1. part 2. c. 9.

(2) 5 Rep. 119. *Com. Dig.* tit. *Pleader*, 2 W. 18.

(3) See 5 Rep. 119.

(4) *Collins v. Blantern*, 2 Wils. 347. 352. *Harmerv. Wright*, 2 Stark. N. P. C. 35.

\* The jury who try the issue may assess the damages under the common venire. *Parkins v. Hawkshaw*, 2 Starkie, N. P. C. 381.

damages, that the bond produced, containing the condition in question, is that on which the action was brought, and on which the judgment was obtained; the mere production of such a bond, without some proof of the identity, is insufficient. (1).

The defendant, in an action on a bond containing a condition to pay on a certain day, may plead payment on the day; for this is, in effect, a plea of performance of the condition, and payment before a breach of the condition is a good discharge, without an acquittance. And now, by the statute 4 Ann. c. 16. s. 12., where the action is brought on a single bill, or bond without a condition, the defendant may plead the same plea. The proof of this issue lies on the defendant; for he maintains an affirmative, which, if proved, will be a complete discharge. Solvit ad diem.

The plea of *solvit ad diem* will be supported by proof of payment before the day appointed, as well as on the day (2); the defendant could not in this case plead payment *before* the day, as he might, if the condition were to pay *on or before* a particular day. Payment before the day, (as Lord Hardwicke said in the case of Tryon v. Carter) (3), where the condition is for payment on a certain day, is strictly not a legal performance of the condition; but it may be given in evidence under the plea of *solvit ad diem* for this reason, because the money is looked upon as a deposit in the hands of the obligee until the day comes, and then it is actual payment. A payment of the debt to a third person by the plaintiff's appointment is payment to the plaintiff himself. (4)

Proof of the defendant having paid interest after the day of payment will falsify the plea of *solvit ad diem*, such subse-

(1) *Hodgkinson v. Marsden*, 2 Campb. 181. In this case, the plaintiff's attorney proved, that the bond produced was the bond delivered to him, for the purpose of bringing the action, and on which the action was afterwards brought, and the plaintiff recovered on this evidence.

(2) Bull. N. P. 174. citing *Winch v. Pardon*.

(3) 7 Mod. 231.

(4) *Taylor v. Beal*, Cro. El. 222.

quent payment raising the strongest presumption, that the debt was not paid on the day appointed. And though the bond is old, and the payment of interest was made at such a remote period, that the whole debt may be presumed to have been discharged since that time, still the plea will be falsified, by proving interest paid after the appointed day. (1) The defendant in such a case, in order to take advantage of the legal presumption of payment after the lapse of twenty years, ought to plead the plea of *solvit post diem* (2); and then, if nothing is proved but the payment of interest above twenty years ago, the issue ought to be found for the defendant.

Payment presumed after 20 years.

If a bond has been suffered to lie dormant for twenty years, this of itself raises a presumption of payment. Forbearance for so long a time, unexplained, is a circumstance, from which the jury may and ought to infer, that the bond has been satisfied. (3) It has been sometimes said, that payment may be presumed even within that time (4); but this is to be understood with reference only to those cases, where there has been some other evidence to raise such a presumption, as, the settling of an account in the intermediate time, without noticing any demand upon the bond. (5) However, the presumption, arising after such a lapse of time, may be repelled, by proof of the defendant's recent admission of the debt; or by proof of the payment of interest within 20 years, which is an acknowledgment, that the principal sum was not then discharged (6); or the presumption may be answered by proof of other circumstances, explaining satisfactorily, why an earlier demand has not been made. (7)

Indorsements on a bond, purporting that interest has been paid on the principal sum, have been admitted in evidence,

(1) *Moreland v. Bennett*, 1 Str. 652. Bull. N.P. 174.

(2) This plea is given by St. 4., 5 Ann. c. 16. s. 12.

(3) 6 Mod. 92. 4 Burr. 1963. *Oswald v. Legh*, 1 T. R. 270.

(4) 1 Burr. 434. Cowp. 109.

(5) 1 T. R. 271, 272. 4 Burr. 1963. *Cotter v. Budd*, 1 Campb. 27.

(6) 1 T. R. 270.

(7) As in *Newman v. Newman*, 1 Starkie, N.P.C. 101., where the obligee had resided abroad for the last twenty years.

under certain circumstances, as proof of the fact there stated, to repel the presumption of payment of the principal, and to raise a contrary presumption, namely, that the principal sum has not been discharged. An indorsement to this effect in the handwriting of the *obligor*, or made by his direction, or with his privity, is clearly admissible in evidence against him, or against his personal representative, as an admission. But whether indorsements by the *obligee* can be admitted in favour of his personal representative, in an action against the obligor, is a very different question, and requires consideration. The general principle certainly is, that a person cannot make evidence for himself: what he says or writes for himself cannot be evidence in support of his right, and consequently cannot be evidence for his representative claiming in his right or place; what a party has said or done, may be evidence against himself, but it can only be admitted to restrain, not to advance his interest. (1) And although there are a variety of cases, in which written entries by persons against their interest have been admitted after their decease as evidence of the fact there stated, it is to be observed, that in those cases the entries have been received in evidence, not in favour of the persons who made them, nor for their representatives, but on the part of third persons, who had no concern whatever in making them. There must, therefore, be some special circumstances, to form an exception to the general rule, and to render such indorsements admissible.

The case of *Searle v. Lord Barrington* (2) is the earliest reported case, that can be found after a careful search, in which

(1) 2 Ves. 42, 43. 5 T. R. 123.  
 (2) 2 Str. 326. 3 Mod. 379. S. C.  
 3 Ld. Raym. 1370. S. C. 3 Brown,  
 P. C. 593. S. C. The dates will be  
 found to be as follow:—The bond  
 was dated in June, 1697; the obli-  
 gor died in 1710, the plaintiff's let-  
 ters of administration were obtained  
 in July, 1723; the first action was  
 tried before Pratt C. J. in 1724; the  
 second action, before Raymond C. J.  
 in 1726. The writ of error in the

Exchequer Chamber was in 1729;  
 and the judgment of the Exchequer  
 Chamber was affirmed on appeal to  
 the House of Lords in 1730. (See  
 the Reports in Strange and Brown.)  
 The time of the *obligee's* death is not  
 stated in any of the reports; but it  
 appears that administration of his  
 effects was sued out in 1723, which  
 was about twenty-six years after the  
 date of the bond.

the effect of indorsements in the handwriting of the *obligee* appears to have been considered. This was an action on a bond, brought by the plaintiff as administratrix of her deceased husband (the *obligee*) against the defendant as administrator of the obligor. The defendant pleaded *solvit ad diem*, and insisted on the length of time, that had elapsed between the date of the bond and the commencement of the action, which was about twenty-seven years, as raising a presumption, that the money had been paid; in answer to this, the plaintiff offered in evidence two indorsements on the bond (1), in the handwriting of the *obligee*, one dated in December 1699, the other in March 1707, purporting, that the whole of the interest had been paid up to the time of these dates. The Ch. Justice Pratt, before whom the action was first tried, rejected the evidence (2), on account of the inconvenience, which would arise from allowing the *obligee*, in whose custody the bond always remains, to make such indorsements, whenever he might think proper. The plaintiff was accordingly nonsuited. But after an argument in the Court of King's Bench, on a case stated for the opinion of that Court, the other three Judges held (3), that the indorsements in question ought to have been left to the consideration of the jury; "for the jury (as the report in *Strange* states,) might have reason to believe, it was done with the privity of the obligor: and the constant practice is, for the *obligee* to indorse the payment of interest, and that for the sake of the obligor, who is safer by such an indorsement, than by taking a loose receipt." And the report in the 8th Mod. is full and strong to the same effect; "it is the daily practice (says that report,) to make such indorsements on bonds, and generally at the request of the obligor; and this is the best and surest evidence of the payment of the money, because acquittances and notes may be lost, whereas indorsements will continue as so many brands on the bond, into whose hands soever it falls, as long as the original, which creates the charge, shall continue." The nonsuit was not set aside, because at that time

(1) See 3 Brown, P. C. 595. and  
2 Lord Raym. 1370.

(2) See the Reports in *Strange*,  
& 8 Mod.

(3) See Rep in *Strange*

there was a prevailing notion, that as the plaintiff had been put out of court by the nonsuit, the Court could not order a new trial. The plaintiff afterwards brought a new action, which was tried before Lord Raymond; and the same indorsements were again offered in evidence, to repel the presumption of payment of the principal. The counsel for the defendant objected to the evidence (1), on the ground, that it did not appear, when those indorsements were made, otherwise than by the indorsements themselves. But Lord Raymond was of opinion, that the indorsements were evidence, to be left to the consideration of the jury, and therefore allowed them to be read; and, other circumstantial evidence being given to induce the jury to believe, that the bond had not been satisfied (2), the plaintiff had a verdict. The defendant's counsel tendered a bill of exceptions, which was sealed by the Chief Justice; and a writ of error was brought in the Exchequer Chamber. The errors were twice argued, in the Exchequer Chamber, and the judgment of the Court of King's Bench was affirmed. (3) A writ of error was then brought in the House of Lords; and after counsel had been heard on this writ of error, and the Judges had delivered their opinions *seriatim*, the House of Lords affirmed the judgment of the Exchequer Chamber.

The grounds of the decision in the Exchequer Chamber, and in the House of Lords, do not appear in any of the reports. The reason given by the Court of King's Bench, on the argument after the first trial, has been before mentioned: the three Judges, on that occasion, who were against the rejection of the evidence, adverted to the common practice of indorsements being made by the obligee, and were of opinion that the indorsements ought to have been left to the jury, who were to consider, whether the indorsements were made with the privity of the obligor. There appears to have been no

(1) See Report in Brown.

(2) See Brown's Report.

(3) According to the Report in Strange, five Judges thought the evidence admissible, two were of the

contrary opinion. The Report in Brown states, that the judgment was affirmed by the opinion of all the Judges.

direct proof of the indorsements having been made at the time when they bore date, and this is mentioned as the ground of the objection. (1) If the obligee, by whom the indorsements were made, had died within twenty years after the date of the bond, this would have supplied direct evidence, at least, that the indorsements were made before the presumption of the payment of the principal could have arisen, and when it was against the interest of the obligee to make such indorsements, if the fact of the receipt of interest was untrue; and then, it might have been said, the jury would be warranted in concluding, that such indorsements, so made against the interest of the party, had been made with the privity of the obligor. But the death of the obligee is not stated in the reports; and, to judge from the course of the arguments in the Court of King's Bench, as well as in the House of Lords, it seems not to have been proved. Nor is there any other direct proof of the indorsements having been made within twenty years. However, there is reason to believe, from the report in Brown's Parl. Cases, that circumstantial evidence of some kind was produced, confirmatory of the indorsements; that report stating, "the Chief Justice (Lord Raymond) being of opinion, that these indorsements were evidence to be left to the consideration of the jury, allowed them to be read; and other circumstantial evidence being given, to induce the jury to believe the bond was not satisfied, there was a verdict for the plaintiff." And this is the view of the case which has generally been taken in explaining the principle and grounds of the decision. Lord Hardwicke, in the case of Glyn v. The Bank of England (2), where the case of Searle v. Lord Barrington was much observed upon, said, "he took it, in that case, the indorsements were made, and bore date, within twenty years." And the Lord Chief Justice Lee, in the case of Turner v. Crisp (3), which was about ten years after the judgment in the House of Lords, said, "the indorsement in the case of Searle v. Lord Barrington appeared to be made, before it could be thought necessary to be made use of to encounter the pre-

(1) See the Report in Brown.

(5) 2 Stra. 827.

(2) 2 Vea. 42.



sumption." Lord Ellenborough also, in the case of *Rose v. Bryant* (1), after observing, that "he had been at a loss to see the principle, on which these receipts in the hand-writing of the creditor had sometimes been admitted as evidence against the debtor," added, "I am of opinion, they cannot be properly admitted, unless they are proved to have been written at a time, when the effect of them was clearly in contradiction to the writer's interest."

The case of *Searle v. Lord Barrington* seems, therefore, at least, to have established this principle, (if the reports of that case are correct,) that indorsements by the obligee, purporting to be made within twenty years after the date of the bond, though not proved by direct evidence to have been made within that time, are yet admissible, to repel the presumption of payment, after the lapse of twenty years, and are proper to be left to the consideration of the jury, provided there are any circumstances in the case, to show that the indorsements have been made before the presumption could arise.

An indorsement by the obligee, purporting that part of the principal sum has been received, if made after the presumption of payment has arisen, is clearly inadmissible. (2) And further, if the defendant produces direct evidence of the payment of the principal sum and interest at a certain time within twenty years, the plaintiff cannot be allowed to encounter that evidence by an indorsement in the hand-writing of the obligee, purporting that interest was paid at a subsequent time (3); for, supposing the fact to be true, that the bond had been satisfied by payment, it would obviously be his interest to make such an indorsement, which might afterwards be used as evidence in an action upon the bond.

The plea of *nil debet*, by which the defendant denies his Nil debet.  
owing any part of the sum demanded, and traverses the whole

(1) 2 Campb. 323.

(3) *Rose v. Bryant*, 2 Campb. 322.

(2) *Turner v. Crisp*, 2 Str. 827. by  
Lee C. J.

of the declaration, makes it necessary for the plaintiff to prove his demand as stated, and allows the defendant to prove, on his part, any thing which shows, that there is no such debt, as the plaintiff has alleged. The defendant, therefore, under this issue, may prove payment to the plaintiff, or to another by his appointment (1), or he may show a release. (2.) In an action of debt upon a lease, for arrears of rent, the defendant cannot, under the plea of *nil debet*, give evidence of disbursements for necessary repairs, not even where they ought to have been made by the plaintiff (3); unless perhaps in the case of a lease, where it is part of the covenant, that the tenant should deduct from the rent for such repairs. (4)

Secondly, as to an action of debt for penalties.

Action for penalties.

The action of debt is often brought to recover penalties under a penal statute. In this action the plaintiff, besides proving the act imputed to the defendant, and all the affirmative averments in the declaration, must show also, that the action has been regularly commenced within the limited time. If this does not appear from the *nisi prius* record, it must be shown by proof of the suing out of the writ, or by other legitimate evidence; and this the plaintiff may show in any stage of the cause. (5)

(1) Taylor v. Beal, Cro. El. 222.

(2) Anonym. case, 5 Mod. 18. Cecil v. Harris, Cro. El. 140. Gal-  
faway v. Susach, 1 Salk. 284. ruled  
by Holt. C. J. \*

(3) Taylor v. Beal, Cro. El. 222.  
(Gawdy J. contra.) Bull. N. P.

177. Ch. B. Gilbert thinks this  
evidence admissible. Gibb. Ev. 245.

(4) 1 Ld. Raym. 420.

(5) Maughan v. Walker, Peake, N.  
P. C. 163.

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\* Chief Baron Gilbert lays it down in his Treatise, that a release is not admissible under the plea of *nil debet*; but the reason given by him (namely, that the release ought to be pleaded, to enable the Court to judge, whether the debt is discharged with those apt words and solemnities, which the law requires to make a good contract,) is not satisfactory; and all these cases, which determine, that a release is admissible in evidence under the plea of *non assumptit*, seem to be so many authorities in support of the rule laid down in the text.

The suing out of a *latitat* is a sufficient commencement of the action, to save the limitation of time (1); and proof of the delivery of the declaration within the time is sufficient. (2) If a writ, which would warrant the declaration, has been sued out in proper time, that is sufficient, at least as to the commencement of the action; and the return of the writ need not be proved. (3) Where, indeed, an *alias* writ has issued, but not within the time, and the first writ was within the time but not served, there the return of the first writ ought to be proved; for in this case it is necessary to show, that the second writ, on which the plaintiff has declared, is a continuation of the first; and this can only be done by showing, that the first was returned, in order to warrant the issue of the *alias* writ. (4)

Commence-  
ment of  
action.

The defendant in this action may of course give in evidence, under the general issue of *nil debet*, any proviso in the penal statute, exempting him from the penalty; and it should seem also, that he may avail himself of such a proviso contained in any other public act. (5) He cannot prove, under this plea, that penalties have been already recovered in a former action for the same offence; such a defence ought to be pleaded specially, that the plaintiff may have an opportunity of replying *nul tiel record*, or that the recovery was fraudulent to defeat a real prosecution. (6)

Evidence for  
defendant

The competency of witnesses living in the place, for the benefit of which a pecuniary penalty is to be applied, has been before mentioned. (7) They are rendered competent by the provisions of a particular act of parliament; and their competency is confined to those cases only where the penalty does not exceed twenty pounds. Before the passing of this

Witness.

(1) *Culliford v. Blandford*, Carth. 232. by 3 Judges against Holt C. J. *Hardyman v. Whitaker*, 2 East, 575. in note. See further on this subject, in action against Justices of the Peace.

(2) *Matthews v. Haigh*, 4 Esp. 100. *Harris v. Orme*, 2 Camph. 497. n.

(3) *Parsons v. King*, 7 T. R. 6.

(4) 7 T. R. 7.

(5) See vol. i. part 2. c. 1. ad fin.

(6) *Bredon q. t. v. Harman*, 2 Str. 701.

(7) See vol. i. p. 136.

act, they would have been incompetent. Thus it had been held by Lord Raymond, in a case where part of the penalty would have belonged to a city or town corporate, in which the offence was committed, that freemen and their wives could not give evidence. (1)

(1) *R. v. Seymour*, Bull. N. P. 195.

## CHAP. IX.

### *Of Evidence in an Action for Defamation.*

**I**N treating of this subject, the most convenient plan will be, to consider at the same time the action for slander, together with the action for a libel. And it may be observed generally of both these actions, that the leading points to be proved, are, First, the speaking or publication of the slanderous matter stated on the record; Secondly, the fact of the plaintiff being of a particular profession, office, or trade, when this is alleged in the declaration as a necessary inducement to the action; Thirdly, the extent of damage, which the plaintiff has sustained in consequence of the slander.

#### I. First, Of the proof of publication.

A publication of the slander, by which is meant the communication of it to some other person, may be effected in a variety of different ways; and the proof of the publication will vary according to the nature of the subject-matter.

Proof of  
words spoken,  
as averred.

The publication of slanderous words, which have been spoken, is to be proved by some person present, when the defendant spoke them. And the words must be proved, as

stated in the declaration (1); not that the whole of the words, alleged on the record, need be proved, but some material part of them (2); and damages may be given for such of the actionable words as are proved (3), precisely as in other actions the plaintiff recovers to the extent of his proof. In the case of *Hall v. Smith* (4), where the declaration stated, that the plaintiff was a trader at C. and also a trader at O., and that the defendant spoke concerning the plaintiff as such trader, that he was a bankrupt at C., &c., it was proved at the trial, that the plaintiff carried on a trade at O., but not that he carried on the other trade at C., as stated, and the words spoken of him were, that he was a bankrupt at C. in the liquor trade, (which was the trade carried on at O.,) the Court held, that the substance of the charge had been proved, and that the place, where the plaintiff was stated to have become a bankrupt, was immaterial.

Although the plaintiff need not prove all the words on the record, yet he must prove so much of them as will be sufficient to sustain his cause of action; and, most clearly, it is not enough for him to prove equivalent words of slander. (5) The words, proved to have been spoken, ought to convey the same idea, as they convey to a person reading the words on the record, otherwise there is a fatal variance. (6) If stated on the record affirmatively, or with some qualification or extenuation, they must appear the same in proof. And as it is sufficient to prove the substance of the words to have been spoken, so also it will be sufficient to prove the mode of publication the same in substance; thus, if the allegation is, that the defendant spoke the words in the presence and hearing of a certain person named and of other persons, this would be supported by proving them to have been spoken in the presence of others only. (7)

(1) *Barnes v. Holloway*, 8 T. R. 150. (3) *Compagnon v. Martin*, 2 Black. Rep. 790.

(2) *Maitland v. Goldney*, 2 East, 434. by Lawrence J. See also *Fig-* (4) 1 Maule & Selw. 287.

*gins v. Cogswell*, 3 Maule & Selw. (5) 2 East, 438.

369. *Solomons v. Medex*, 1 Starkie, (6) 8 T. R. 150.

*N. P. C. 191. Hancock v. Winter*, (7) Bull. N. P. 5. 2 Barn & Ald.

7 Taunt. 205. *Walters v. Mare*, 756.

2 Barn. & Ald. 756.

The averment in the declaration, that the defendant spoke the slanderous words "of and concerning the plaintiff," is the foundation of the plaintiff's complaint, and must be clearly proved. An allegation of the words having been spoken of several co-plaintiffs in their joint trade, is not supported by proof of the defendant's addressing the words personally to one of the parties alone, in the absence of the others. (1)

Publication of libel.

The publication of a libel may be in various forms; as by distributing it, or repeating its contents in the presence of others, or sending it to a third person. The writing of a copy of the libel, though manifestly not of itself a publication, is said to be evidence of publication (2); when a libel is produced written by a man's own hand, to use the language of Lord Holt, he is taken in the main. (3) A libel, written in a foreign language, ought to be set forth in the declaration, both in the original and in an English translation (5); and the translation must be proved to be correct, by a person acquainted with the original language. (6)

If the defendant is a bookseller, or a proprietor of a newspaper, and the libel was sold in his shop by a person acting there as his servant, this is *prima facie* evidence of a publication by the bookseller himself. This is an established principle of law. And if the defendant is a printer, and has printed the libel at his office, this also is a publication by him; this rule seems to be as clearly settled as the former.

Publication of newspaper.

The mode of proving a person to be the publisher or proprietor of a newspaper, has been much facilitated by a late act of parliament (7), the principal object of which was to prevent the mischiefs arising from the printing and publishing of newspapers by persons unknown. That act declares it ille-

S. 1. 2. 5.

(1) *Solomons and others v. Medex*, 1 Starkie, N. P. C. 191.

(2) *Lamb's case*, 9 Rep. 59. b.

(3) 1 Ld. Raym. 417. 2 Black. Rep. 1037. *Mullet v. Hulton*, 4 Esp. 248.

(5) *Zenobio v. Axtell*, 6 T. R. 162.

(6) *R. v. Peltier*, 2 Selw. N. P.

(7) St. 38 G. 3. c. 78.

gal for any person to print or publish a newspaper, until there has been delivered to the commissioners for stamp-duties at their head-office, or to some officer appointed by them for this purpose, an affidavit or affirmation in writing, signed by the person making it, specifying the true names, additions, descriptions, and places of abode, of every person intended to be printer or publisher, as well as of the proprietors of the newspaper, the true description of the house where the paper is intended to be printed, and the title of the paper. — The S. 9. 9th section enacts, that these affidavits shall be kept as the commissioners direct, and that they, or certified copies of them, shall, in all civil and criminal proceedings touching any newspaper there mentioned, be admitted as conclusive evidence of the truth of the matters set forth in the affidavits, against every person who has signed and sworn, and shall also be admitted as sufficient evidence of the truth of such matters against every person therein mentioned to be a proprietor, printer, or publisher, unless the contrary shall be satisfactorily proved. — The 11th section enacts, that, after S. 11. producing in evidence such affidavit or a certified copy, and after producing a newspaper, entitled in the same manner as the newspaper mentioned in the affidavit, and in which the names of the printer and publisher, and the place of printing, are the same as those mentioned in the affidavit, it shall not be necessary for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by the act, to prove that the paper was purchased at any house or office, belonging to or occupied by the defendant, or by his servants or workmen, or where he usually carries on the business of printing or publishing the paper, or where the same is usually sold. — The 13th section further enacts, that S. 13. the commissioners or officers, by whom the affidavit is kept, upon application to them by any person requiring a certified copy of the affidavit, in order that it may be produced in any civil or criminal proceedings, shall deliver such certified copy to the person applying. — The 14th section, after reciting the S. 14. public inconvenience, which must result from obliging the

officers to attend personally for the purpose of proving the signing and swearing of the parties, enacts, that in all cases a copy of any such affidavit or affirmation, certified to be a true copy under the hand or hands of one or more of the commissioners or officers in whose possession the same shall be, shall, upon proof made that such certificates have been signed with the hand-writing of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, or officer or officers, be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and such copies, so produced and certified, shall also be received as evidence, that the affidavit or affirmation, of which they purport to be copies, have been sworn or affirmed according to this act, and shall have the same effect, for the purposes of evidence, to all intents whatsoever, as if the original affidavits or affirmations, of which the copies, so produced and certified shall purport to be copies, had been produced in evidence, and been proved to have been duly so certified, sworn, and affirmed, by the person or persons appearing by such copy to have sworn or affirmed the same as aforesaid. — The 17th section requires the printer or publisher to deliver to the commissioners at their head-office, or to officers appointed by them, one of the papers signed by the printer or publisher, with his name and place of abode; and further enacts, that in case any person shall make application to the commissioners or to such officers, in order that such newspaper or other paper, so signed by the printer or publisher, may be produced in evidence in any civil or criminal proceeding, the said commissioners or such officers shall, at any time within two years from the publication, either cause the same to be produced in the court, in which it is required to be produced, and at the time when it is required to be produced, or shall deliver the same to the party applying for it, taking, according to their discretion, reasonable security at his expence, for returning the same to the said commissioners or such officer.

S. 17.



It has been determined, in the construction of this act, that an affidavit, containing all the particulars required by the act, together with a copy of a newspaper produced from a stamp office, containing the libel, and corresponding exactly with the description in the affidavit, is not only evidence of the publication by the parties named, but evidence also that the paper was published in that particular county, where the affidavit specifies it to have been printed. (1) This would be good evidence of such a publication under the 9th section, without the aid of the 11th section, which last renders it most clearly admissible. The publication may be proved by the original affidavit, signed by the defendant as the sole proprietor of the paper, and specifying the place where it was intended to be published, together with proof that a copy of the paper, containing the alleged libel, had been there purchased. (2) If a certified copy of the affidavit is produced in evidence, purporting to have been sworn before a distributor of stamps in the country, it ought to be proved that he had authority to take the affidavit, unless the affidavit itself state the fact; if the *jurat* purport, that the officer had such authority, further proof will not be necessary. (3)

After proof of the publication by the defendant, the libel itself is to be read; and on comparing that part of it, which the declaration professes to exhibit, with the corresponding part on the record, if there appear to be a variance in the sense, that is, if the part set forth in the record convey a different idea from that conveyed by the corresponding part in the original libel, it is a material variance, and the plaintiff will not be entitled to recover on that count, in which such a variance occurs. Thus, where the libellous passages, contained in one of the counts of the declaration, were set out, as if they formed one entire and continuous part of the libel from which they were taken, but the meaning of the sentence was materially altered by the omission of the name of the person alluded to, Lord Ellenborough held, that the plaintiff

Variance in proof.

(1) *R. v. Hart and White*, 10 East, 94.

(2) *R. v. White*, 3 Campb. 100.

(3) *Id.* 99.

could not recover on that count. (1) The written libel, produced in evidence, and the libel set forth on the record must exactly agree; if any omission makes a word of another signification, it is fatal, because every word in the information is a mark of description of the libel itself. (2) But the omission or addition of a letter, provided it does not change the word so as to make it another word, has been held to be an immaterial variance. (3)

**Proof of other libels, &c. referring to the same subject.**

The plaintiff, after proving the words as laid in the declaration, may prove also, that the defendant spoke other actionable words on the same subject, either before or afterwards (4), or that he published other libels on the same subject, or other copies of the same libel. (5) This evidence is admissible, not in aggravation of damages, but for the purpose of proving the defendant's malice in deliberately publishing or speaking the words, which are the subject of the action. For this reason, in a late case, where the intention of the defendant, in publishing the libel, was not in any degree equivocal, Lord Ellenborough refused to admit evidence of the publication of other libellous papers, subsequent to that which was the subject of the action. (6) The distinction, which was at one time made between words actionable and such as are not actionable, (that, in the latter case other words might be given in evidence, but not in the former (7), has been since properly overruled. (8)

(1) *Tabart v. Tipper*, 1 Campb. 352.

(2) Holt C. J. in *R. v. Drake*, Holt, Rep. Temp. 426.

(3) *R. v. Beech*, 1 Leach, Cr. C. 158. Cowp. 329. S. C. Indictment for perjury in an affidavit. The word *understood* was in the affidavit; but in the assignment of perjury, the word was written *undertood*. The Court, on an application for a new trial, held, that this did not make the word another word, and overruled the objection. And see *R. v. May*, 1 Doug. 193. and *R. v. Hart*, 2 East, P. C. 977.

(4) *Charter v. Barrett, Peake*, N. P. C. 22. *Rustell v. Macquister*, 1 Campb. 49. *Tate v. Humphrey*, 2 Campb. 73. (5) *Plunkett v. Cobbett*, 2 Selw. N. P. 938.

(6) *R. v. Pearce, Peake*, N. P. C. 74. *Lee v. Huson, Peake*, N. P. C. 166. *Plunkett v. Cobbett*, 5 Esp. N. P. C. 136.

(7) *Stuart v. Lovell*, 2 Starkie, N. P. C. 93.

(8) *Mead v. Daubigny, Peake*, N. P. C. 125.

(9) *Rustell v. Macquister*, 1 Campb. 49. And see cases cited above.

In the last case on this subject, *Finnerty v. Tipper* (1), which was an action for a libel published in a periodical work, Mansfield C. J. refused to admit in evidence subsequent numbers of the same work, unless they expressly referred to the libel, for which the action was brought; for the subsequent publication, he said, might contain the most scandalous imputations, while the former libel may have been almost nothing; and the necessary consequence must be, that the jury would give damages for the second libel in an action for the first, although the defendant would not have the same opportunity of proving the truth of its contents, as if it were made the subject of a distinct action. The Chief Justice was of opinion, that the same restriction was proper, and had been observed, in actions for words spoken, namely, that the subsequent words ought to refer to the same subject\*; and he drew a distinction between the case then before him and that of *Carr v. Hood*, which had been cited for the admissibility of the evidence; the defence there was, that the publication in question was fair criticism on the writings of the plaintiff, and therefore any other papers published by the defendant, to shew, that he was actuated by malice in publishing the libel complained of, were certainly admissible evidence.

And as it may be proved on the one side, that the defendant published other distinct papers on the same subject, or other libellous passages in the paper, which is the subject of the prosecution, as shewing that he acted deliberately, and from the motives imputed to him; so, on the other hand, the defendant will be allowed, in vindication of his motives, to give in evidence any parts of the same paper, that treat of the same topic as the

(1) 2 Campb. 72.

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\* On a review of the cases, which have been above cited, it will be found, that in all of them except two, namely, *Lee v. Huson* and *Rustell v. Macquister*, the subsequent words or libels, offered in evidence, expressly referred to those which were the subject of the action; and, in those two cases, it does not appear from the reports, whether they had, or had not, such a reference.

supposed libel, and are fairly connected with it. These passages may be so far distant and so disjoined by other matter, and introduced in such a questionable shape, as to have scarcely any material bearing on the paragraph in question; or from their position and context they may be considered as forming parts of the same discussion, and entitled to the greatest weight. Under all circumstances, passages of the same paper, tending to shew the intention and mind of the defendant with respect to a specific paragraph, are material for the consideration of a jury. (1)

II. Secondly, as to the proof of averments, which are necessary by way of inducement to the action.

Words spoken of plaintiff in his profession or business.

Words or other slanderous matter, which are actionable only so far as they attack the plaintiff's character with reference to his profession, office, or trade, must be clearly proved to have been published concerning him in relation to such profession or business: and it must be proved also, that the plaintiff is of the particular profession, or of that situation in life, described by the pleadings. But if the words are actionable from their general import, and not only as bearing on his professional character; proof of his profession or business, though wanted for the purpose of increasing the amount of damages, will not be essentially necessary in support of the action.

1. Proof of legal qualification, when averred.

If the plaintiff in his declaration allege a legal qualification to practise in a particular profession, and the words are actionable only as spoken of him with reference to such profession, a legal qualification must be proved. It is a general principle of evidence, that all the material facts in the declaration, which are put in issue, must be established by legal proof. Thus, in an action for slanderous words, spoken of the plaintiff in his profession of physician, an allegation "that he had duly taken the degree of doctor of physic,"

(1) *R. v. Lambert and Perry*, 2 Campb. 398.

must be strictly proved by formal proof of the degree; even supposing it were not necessary in general for the party to show, that he has regularly taken his degree, yet in this case the proof is indispensable, in consequence of the allegation in the declaration. This was the ground, on which the case of *Moises v. Thornton* (1) appears to have been determined; and though in that case the defamatory words themselves related to a want of diploma, that circumstance was not adverted to by the Court, as any additional reason for requiring such evidence.

Where the words, which are the subject of the action, amount to a distinct acknowledgement of the plaintiff's professional qualification, it will be sufficient to prove, that he practised in that character, and proof of a legal qualification will not be necessary. (2) If a defendant (said Mr. Justice Heath in the case of *Smith v. Taylor*) (3), has admitted the title, by virtue of which the plaintiff sues, this amounts to *prima facie* evidence that the plaintiff is entitled to sue. And upon the same principle, in a prosecution for a libel, if the libel itself show, that certain acts of outrage have been committed, that will be evidence against the defendant, in support of an averment of the commission of such outrages. (4) This rule depends upon the force and effect of an admission.

2. Where the slander admits the qualification.

It may be understood, then, as a general rule, that if the words, on which the action is founded, admit the qualification of the plaintiff, his qualification need not be proved. But it seems questionable, whether the converse is true, namely, that if the words deny the qualification, it ought on that account alone to be proved. The proof of a legal qualification may be rendered necessary by an express averment to that effect in the declaration; but it is a very different question, whether the defendant can impose that necessity of proof on the plaintiff

3. Where the slander denies the qualification.

(1) 8 T. R. 303. 308.

(2) *Berryman v. Wise*, 4 T. R. 366., stated fully in vol. i. *Smith v. Taylor*, 1 New Rep. 196. stated in vol. i.

(3) 1 New Rep. 308.

(4) 4 Maule & Selw. 548. See Mr. Just. Bayley's judgment there. And as to the general principle on this subject, see vol. i. p. 88. &c.

by slanderously denying the qualification. An admission of a fact on the one side may very properly dispense with the proof of that fact on the other side; but it is not easy to understand, why a denial by the defendant should have the effect of increasing the burthen of proof on the part of the plaintiff. The admission of the defendant may justly operate against himself; but why, it may be asked, should his denial operate against the plaintiff? There seems to be this additional reason, why the plaintiff should not be obliged to prove his qualification merely from the circumstance of the defendant having denied it in the slander, which is, that if the defendant plead the general issue without justifying, he thereby admits the slanderous words to be false; that is, he admits on the record, that the plaintiff was qualified; and if an admission contained in the slanderous words themselves, which are the subject of the action, will dispense with the proof of qualification, an admission on the record must, *a fortiori*, have the same effect. However, it has certainly been laid down in one case (1), that "where the abuse relates to the want of qualification, the plaintiff must prove it;" and a *nisi prius* decision of Mr. Justice Buller (2) is cited in support of the rule. There, the action being brought against the defendant for calling the plaintiff a quack, and the averment being, "that the plaintiff had used and exercised the profession of a physician," Mr. Justice Buller held, that proof of the plaintiff having practised as a physician was not sufficient; and that it was necessary to produce the plaintiff's diploma; this was accordingly done, and the plaintiff recovered. Ch. J. Mansfield, in citing this case, considers the opprobrious term, which was the subject of the action, as being used in opposition to the description of a physician regularly qualified; and that, as the word was used in this sense, proof of a diploma would be necessary. However, it may be observed, this does not appear to have been the ground of Mr. Justice Buller's decision; nor was it sug-

(1) By Mansfield C. J. in *Smith v. Taylor*, 1 New Rep. 207. 204. T. R. 305. n., and cited by Mansfield C. J. 1 New Rep. 204.

(2) *Pickford v. Gutch*, cited by counsel in *Moises v. Thornton*, 8

gested in the case of *Moises v. Thornton*, before mentioned (1), in which the case of *Pickford v. Gutch* was cited. It is not improbable, that Mr. Justice Buller might have understood the opprobrious term in another sense, as reflecting on the practice of the plaintiff more than on his qualification; and, if that were so, the ground of the decision must have been, that the diploma ought to be produced, as evidence of the fact of the plaintiff being a physician; but, in this view of the case, it must be allowed, there is some difficulty in understanding, how the production of a diploma could be necessary, as the averment in the declaration (if the manuscript note, cited by the counsel in argument, was correct,) related not to the qualification, but merely to the practice of the plaintiff.

If the slanderous words do not relate to the want of qualification in the plaintiff, and there is no allegation in the declaration as to his legal qualification, but merely of the fact of his acting in that capacity, (for instance, if the plaintiff instead of averring, "that he had duly taken the degree of doctor of physic," allege only, "that he used and exercised the profession of a physician,") it is material to consider, whether such an allegation would be sufficiently proved by showing, that the plaintiff practiced in that capacity, as a physician. In support of the affirmative it may be said, it is not unreasonable to presume, that a person has acted lawfully, until the contrary is shown; that this presumption is constantly made in the case of public officers; that upon the same principle, if a person be abused for unskilfulness or misconduct in his trade, it would be presumed, that he was lawfully carrying on his trade, though perhaps he might not be entitled so to do, without having served an apprenticeship (2); and that there appears to be no better reason for requiring strict evidence of a qualification in the case of a physician, than in that of a tradesman; that formerly, perhaps, the regular proof of a degree might have been considered necessary, but that, of late years, the courts have been inclined in many instances to relax the strictness of the

4. Where neither the words nor the averment relate to the qualification.

(1) *Ante*, p. 155.

(2) 1 *New Rep.* 206., by Mansfield C. J.

old rules respecting proof; when attended with great expence and difficulty (1); and that it would be a great hardship to the plaintiff, to be obliged to prove his qualification, where the scandal does not impute a want of qualification, but is confined to the single point of misconduct. (2) On the other hand, it may be said, no case appears to have decided, that the regular proof of a legal qualification can be dispensed with; and those cases, in which it has been held that such proof is unnecessary, where the words used by the defendant admit the qualification (3), seem to imply, by making an exception to the general rule, that if the legal qualification had not been so admitted, it ought to have been strictly proved. And further, the *nisi-prius* decision in the case of *Pickford v. Gutch*, before mentioned, may be cited to the same effect.

Proof of degree in physic.

The degree of doctor of physic may be proved by the original book of the university or corporation, which contains an entry of the degree having been conferred; or it may be proved by an examined copy of this entry. (4) Or if the medium of proof is a diploma, purporting to be granted by an university, and to bear the university seal, the instrument must be properly authenticated and proved by legal evidence. (5) If the written instrument is produced as the original act of the university, which conferred the degree, it must be proved, that the seal affixed is the seal of the university (6); and with respect to the proof of the seal, it will not be necessary to produce the witness, who saw the seal affixed (7), but the seal ought to be proved by one who knows it to be the seal of the university. If the instrument is produced as a copy of the original act of the university, it must be proved in the usual way as a copy; for the university cannot under their seal give evidence, that the plaintiff had taken such a degree. The degree of doctor of laws, and other degrees of the same

(1) 1 New Rep. 207., by Heath J.

(2) 1 New. Rep. 207.

(3) *Berryman v. Wise*, 4 T. R. 566.  
*Smith v. Taylor*, 1 New Rep. 196.

(4) *Moises v. Thornton*, 8 T. R. 303. 507.

(5) S. C. 307.

(6) S. C. 307., by Grose J.

(7) S. C. 507., by Lawrence, J.



kind, may also be proved by the entry, or by an examined copy of the entry in the books, which contain the act of the university conferring the degree. (1)

In the case of *Moises v. Thornton*, from which these points have been extracted, the proof, offered for the purpose of authenticating the diploma, was, that the professors, by whom the instrument purported to be signed, had been heard to acknowledge their signatures; in addition to this, a certificate from the professors was given in evidence, which certified the granting of the diploma and the affixing of the university seal; and it was further proved, that the officer, whose duty it was to affix the university seal to their public acts, had acknowledged the seal, affixed to the diploma, to be the seal of the university; this evidence was adjudged to be insufficient, and the nonsuit at the trial was affirmed.

The regular proof of a person being an attorney is either by the production of the original roll, signed by the party on his admission, together with proof of his signature, as evidence of the identity of the party; or by an examined copy of the roll, together with the admission. Or the fact, of a person of the same name being an attorney, may be shewn by the entry in the book of the chief clerk, kept in the master's office, into which the names of all attorneys are copied by the chief clerk from the original roll (2); and the admission, or some other proof, will then be wanted, to shew, that this person is the party whose qualification is in question.

Proof of being attorney.

### III. Thirdly, as to the proof of malice.

The declaration imputes malice to the defendant, by averring that he falsely and maliciously published the defamatory words. Malice is the foundation of the action, and ought therefore to be proved; in other words, the jury are to be convinced, before they can find a verdict against the defendant,

Malice.

(1) S. C. 507.

(2) Tidd. Pr. 61. R. v. Crossley, 2 Esp. 526.

that he had the design imputed to him of injuring the plaintiff in his character. Malice may be inferred from the publication, or proved by extrinsic evidence. It must often be extremely difficult to produce direct evidence of a malicious design, extrinsic, and independent of the publication in question: but the publication itself will often afford the most convincing proof of malice. If the words are directly calculated to slander and degrade the character, the obvious inference is, that they were designed to have this effect, unless something can be drawn from the circumstances, attending the publication, to repel such an inference. All the circumstances, therefore, the manner, the occasion, and the matter of the publication, are most material and important considerations.

In a late prosecution against a member of parliament, for publishing in the newspaper a speech, which he had delivered in a debate in the House of Commons (1), one objection was, that there was no direct proof of malice; but Mr. Justice Le Blanc held, that it was not necessary to produce any extrinsic evidence of malice, independent of the publication, and that malice might be inferred by the jury from the publication itself; he stated to the jury, that "where the publication is defamatory, the law infers malice, unless any thing can be drawn from the circumstances, attending the publication, to rebut that inference; and left it to them, to say whether the circumstances of this case did rebut that inference, adding, that in point of law the inference was not rebutted by the circumstance, of the publication being of a speech, delivered by a member of the House of Commons." Here the defendant was privileged only, as a speaker, within the walls of the house; but, as publisher of his speech in the newspaper, stood precisely in the same situation as any other unprivileged person.

**Character.**

In an action for slander, it has been said, the plaintiff's character is in some degree put in issue, and therefore evidence of

(1) *R. v. Creevey*, 1 Maule & Selw. 273. 282. *R. v. Ld. Abingdon*, 1 Esp. N. P. C. 226.

antecedent good conduct, has been thought admissible. (1) But, at the furthest, such evidence is to be confined to general character; and witnesses are not to be examined as to particular facts, for the purpose of falsifying the assertions in the alleged libel, where there is no justification on the record. Lord Ellenborough, in the case of *Stuart v. Lovell* (2), would not allow such an examination, being of opinion, that he could no more hear a falsification on the one side, than a justification on the other.

#### IV. Fourthly, as to the proof of damage.

Proof of  
damage.

It is a well-known rule, that when words are in themselves actionable, it will not be necessary to state any special damage in the declaration, as it manifestly is, if the words are not actionable; and in neither case can evidence be admitted of any loss or injury, sustained by the plaintiff in consequence of the slander, unless it be specifically stated on the record. If the declaration state, that, in consequence of certain words spoken of the plaintiff, A. B. and other persons left off dealing with him, the plaintiff cannot under this statement prove that another person, not named, has left off. (3) In an action for slander of title, a statement, that the plaintiff in consequence lost the sale of his lands, is too general (4); and the fact of a particular individual, not named, having declined to purchase, cannot properly be proved under such a statement. Nor is the plaintiff entitled to recover damages arising from the wrongful act of a third person, though the act may have been done in consequence of the defendant's misrepresentation; as in the case of *Vicars v. Wilcocks* (5), where the damages proceeded from the wrongful dismissal of the plaintiff from his service before the end of the term.

(1) *King v. Waring*, 5 Esp. N.P.C.  
13. by Lord Alvanley.

(2) 2 Starkie, N. P. C. 94.

(3) Bull. N. P. 7.

(4) *Lowe v. Harwood*, Sir W.  
Jones, 196.

(5) 6 East, 1.

**Evidence under the general issue.**

The next question is, what evidence is admissible under the plea of not guilty.

**Accord and satisfaction.**

An accord and satisfaction may be proved under the general issue. And in a late case (1), Lord Ellenborough allowed proof on the part of the defendant, that the plaintiff had agreed to wave the action, in consideration that defendant would destroy certain documents relating to the charge imputed to the plaintiff, which the defendant accordingly destroyed; this evidence was admitted as an accord and satisfaction.

**Truth of words.**

It is an established rule, that the defendant will not be permitted, under this issue, to prove the truth of the defamatory words, even in mitigation of damages; if he intend to justify the words as true, the justification ought to be set forth formally on the record, that the plaintiff may be prepared to defend himself. (2) But if the plaintiff, with a view to show the defendant's malice, proves other defamatory words on the same subject, besides those set out in the declaration, in that case the defendant, not having had an opportunity of justifying by pleading the truth, may prove the truth of this fresh defamatory matter under the general issue (3); this, at least, is the rule, where the defendant, if admitted into such proof, would not thereby prove the truth of the words, for which the action is brought.

**Manner of speaking.**

But where the defence is, that the words were published, not in the malicious sense imputed by the declaration, but in an innocent sense, or on an occasion which warranted the publication, this matter may be given in evidence under the general issue; because it proves that the defendant is not guilty of the malicious slander charged in the declaration (4);

(1) *Lane v. Applegate*, 1 Starkie, N.P.C. 97.

(2) *Underwood v. Parks*, 2 Str. 1300. Bull. N. P. 9.

(3) *Collison v. Loder*, Bull. N. P.

10. *Warne v. Chadwell*, 2 Starkie, N. P. C. 457.

(4) Many cases in illustration of this rule are collected in 1 Saund. 151. n. (1).

as, where the words were spoken by the defendant as counsel, and were pertinent to the matter in question (1); and many other cases might be cited in illustration of the same general rule. And as the defendant cannot prove the truth of the allegation in the libel, under the general issue, so neither can the plaintiff prove their falsehood. (2)

The defendant has in several cases been permitted to show, in mitigation of damages, that before and at the time of the publication of the supposed libel, the plaintiff was generally suspected of the crime imputed to him. (3) This evidence has been thought to be admissible, on the ground that a person of disparaged fame is not entitled to the same measure of damages, as another whose character is unblemished. (4) And Lord Ellenborough is reported to have held, in a late case (5), that although there was no justification, yet the defendant might give in evidence somewhat of the real character of the plaintiff, and show, that it was not unblemished and entire. But proof of general reports concerning the plaintiff's character is not admissible, where the defendant by his plea puts in issue the truth of the charge imputed. (6) In an action for a libel, it may be proved also in mitigation of damages, that the plaintiff has been in the habit of libelling the defendant. (7)

Suspicion of crime, and general reports.

If the libel refer to a newspaper, as containing the particulars of the offensive matter, the newspaper may be given in evidence on behalf of the defendant. (8) And in a late case (9), it is said, the defendant's counsel was allowed to ask a witness, whether, previously to the transaction in question, he had not read in a public newspaper the substance of the libel charged

(1) *Brook v. Sir. H. Montague*, Cro. Jac. 90. *Hodgson v. Scarlett*, 1 Barn. & Ald. 232.

(2) See ante, p. 160. *Stuart v. Lovell*, 2 Starkie, N.P.C. 97.

(3) *Lord Leicester v. Walter*, 2 Campb. 251. and cases there cited. And — *v. Moor*, 1 Maule & Selw. 284.

(4) 1 Maule & Selw. 286. 2 Campb. 254.

(5) *Williams v. Callender*, Holt, N.P.C. 307. See also the words of Gibbs C. J. in Holt, N.P.C. 535.

(6) *Snowdon v. Smith*, ruled by Chambre J., 1 Maule & Selwyn, 286. (a).

(7) *Finnerty v. Tipper*, 2 Campb. 77.

(8) *Mullett v. Hulton*, 4 Esp. 248.

(9) *Wyatt v. Gore*, Holt, N.P.C. 303.

in the declaration; this at least shows, that the newspaper itself, if produced, would have been admissible, in the opinion of the Judge who tried the cause.

Justification,  
that another  
first spoke the  
words.

The defendant has been allowed under certain circumstances to justify the repetition of slanderous words, which have been spoken by another; he must then state the very words that have been used, and prove some material part of them. (1) But, under the general issue, proof of the defendant having heard from other persons the charge, which he afterwards imputed to the plaintiff, has been held to be inadmissible. In a case where this kind of evidence was proposed, Chief Justice Gibbs held (2), that as the slander, imputed to the plaintiff, was stated, as a fact of the defendant's own knowledge, the defendant could not, when called to answer for it, say another person had told him so. "If an action," said the Chief Justice, "be brought against A. for calling B. a thief, it is no defence for A. under the general issue, to prove, that he was told so by C.; A. is answerable for the full measure of his slander. If he qualifies his charge, or annexes to it, at the time of uttering it, his author, (naming him,) it opens another consideration. General reports have been admitted in mitigation of damages, but not the specific facts."

(1) *Maitland v. Goldney*, 2 East, 426.

(2) *Mills v. Spencer*, Holt, N.P.C. Rep. 534.

## CHAP. X.

### *Of Evidence in an Action on the Case for a malicious Prosecution or Arrest.*

1. Action for  
malicious  
prosecution.

THE next action, to be considered, is an action on the case for a malicious prosecution; in which the plaintiff will have to prove, that proceedings have been instituted against him as described in the declaration, that they originated in the

malice of the defendant, and without probable cause; and that all such proceedings are determined.

In the first place, it must be proved, that the defendant was the prosecutor in the proceedings, which are charged to be malicious. One of the grand jury, before whom a bill of indictment has been preferred, may be called to prove the fact, that the defendant was the prosecutor. (1) The information taken by the magistrate, or the warrant issued by him, may be sufficient for this purpose. The warrant is admissible, without proof of the information upon which it was grounded (2); and if the warrant is lost, parol evidence of its contents will be received, as in other cases. The indorsement of the defendant's name on a bill of indictment, which has been laid before the grand jury, shows that he was sworn to the bill, though it is not the only admissible proof of that fact; but it is not any evidence of his being the prosecutor. (3)

Defendant the prosecutor.

The prosecution, which is charged to be malicious, must be shown to have been determined; otherwise it may possibly happen, that the plaintiff may recover in the action, and yet, if the prosecution is not determined, may be afterwards convicted of the original charge. If the bill of indictment was returned by the grand jury not a true bill, or if the plaintiff was acquitted on the trial of the prosecution, these facts can only be proved by the original record, or by an examined copy of the record (4); and an order of the Court, before whom the plaintiff was tried, permitting him to have a copy of the record, is not absolutely necessary for the introduction of a copy in evidence. (5) An allegation, that the plaintiff was duly and in a lawful manner acquitted by a jury of the country, is proved by the record, from which it appears, that the jury found the plaintiff not guilty, and thereupon judgment was entered that the plaintiff should go acquitted. (6) An

Determination of prosecution.

(1) *Sykes v. Dunbar*, Selw. N. P. tit. *Malicious Prosecution*.

(2) *Newsam v. Carr*, 2 Starkie, N.P.C. 70.

(3) *Bull. N. P.* 14.

(4) As to these points, see vol. i. part 3. c. 5.

(5) *Legatt v. Tollervey*, 14 East, 302., stated in vol. 1.

(6) *Hunter v. French*, Willes, 517.

entry of a *nolle prosequi* by the Attorney General is not such a termination of the prosecution, as will enable the plaintiff to maintain this action, because new process may issue on the same indictment. (1)

Want of probable cause.

The essential ground of this action is, that a legal prosecution was carried on without a probable cause. This is emphatically the essential ground, because every other allegation may be inferred from this; but this must be substantively and expressly proved, and cannot be implied. From the want of probable cause, malice may be, and most commonly is, implied: the knowledge of the defendant is also implied. But the want of probable cause cannot be implied from the most express malice. A man, from a malicious motive, may take up a prosecution for real guilt; or, from circumstances which he really believes, he may proceed upon apparent guilt; and in neither case is he liable to this kind of action. (2) The question of probable cause is a mixed proposition of law and fact. Whether the circumstances, alleged to show it probable or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law. (3)

Some proof of the prosecution having been instituted without probable cause is essentially necessary. It will not be sufficient merely to prove, that on the trial of the indictment, the defendant, who was the prosecutor, did not appear, and that the plaintiff was consequently acquitted (4); if courts of justice were to hold, that the mere circumstance of the defend-

(1) *Goddard v. Smith*, 6 Mod. 261. 1 Salk. 21.

(2) Judgment of Lord Mansfield and Lord Loughborough, in *Johnstone v. Sutton*, 1 T. R. 544. 2 T. R. 231.

(3) *Ibid.*

(4) *Purcel v. M'Namara*, 1 Campb. 199., so ruled by Lord Ellenborough, and confirmed by Court of K. B., 9 East, 561. *Sykes v. Dunbar*, 1799. S. P., ruled by Lord Kenyon; 1 Campb. 202. in note. *Incle-*

*don v. Berry*, 1105. S. P., ruled by Le Blanc J.; 1 Campb. 203. in note. In the last-cited case, there was evidence of express malice in the defendant against the plaintiff; yet Mr. Justice Le Blanc held, that the defendant could not be called upon for his defence, until some evidence had been given of want of probable cause, though, under the circumstances, slight evidence would be sufficient. And see 6 Mod. Rep. 73.



ant's non-appearance at the trial is sufficient proof of the want of probable cause, it would follow, that every person who institutes a prosecution, and sees reason to drop it, is *prima facie* a malicious prosecutor; a supposition extremely dangerous to the criminal justice of the country, and at the same time perfectly unfounded, as the prosecution may have been commenced and abandoned from the purest and most laudable motives. (1) Nor is it sufficient to prove, that the defendant, after commencing a prosecution, did not proceed to prefer a bill of indictment (2); or that the bill of indictment, on being preferred, was returned by the grand jury, not a true bill. (3)

If an action is brought against a magistrate for a malicious conviction, the question is not whether there was any actual ground for imputing a crime to the plaintiff, but whether there appeared to be any ground upon the hearing before the magistrate; and this can only appear by proving what passed upon the hearing, when the conviction took place. (4) If the depositions of witnesses were taken down in writing at the hearing before the magistrate, they ought to be produced on the part of the plaintiff.

Where an action is brought for maliciously preferring an indictment, charging the plaintiff with the crime of perjury in an affidavit, and the whole of the indictment is set out on the record, if it appear that there was no probable cause for assigning perjury on some of the transactions contained in the affidavit, the plaintiff will be entitled to recover, although other parts of the affidavit, respecting transactions within the plaintiff's knowledge, were falsely sworn. The charge, said Gibbs J., is not that the defendant imputed perjury without probable cause, but that he preferred that indictment without probable cause.

(1) By Court of K. B. in refusing a rule nisi for a nonsuit, in *Purcel v. M'Namara*, 1 Campb. 205.

(2) *Wallis v. Alpine*, 1805, by Lord Ellenborough, 1 Campb. 204. in note.

(3) *Byne v. Moore*, 5 Taunt. 187.

(4) *Burley v. Bethune*, 5 Taunt. 580.

There is no probable cause for some of the charges in the indictment, therefore the indictment is preferred without probable cause. (1)

**Malice.**

Another point to be proved in this action, is the defendant's malice in instituting the proceedings; and on the proof of this malicious motive, the amount of damages will principally depend. Express malice is shown by proof of expressions of ill-will, old grudges, &c.; or malice may be implied from the want of probable cause; for the want of probable cause may be so strong and plain, as necessarily to raise an inference, that malice alone could have suggested the prosecution. (2) An acquittal for want of prosecution is clearly not a sufficient ground for presuming malice. (3) Proof, that there was in reality no ground for imputing the crime to the plaintiff, shows, that the prosecution was instituted without probable cause, and malice may be thence inferred. (4)

**Variance between the proofs and the record.**

The rule respecting variances, when a record is referred to in the pleadings, has been before considered (5); and it will be sufficient to cite one or two instances in addition to those already mentioned. An allegation in the declaration, that the plaintiff was acquitted by a jury in the court of our Lord the King before the King himself at Westminster before the Chief Justice, is not supported by a record, which shows that the trial took place before the Chief Justice at Nisi Prius. (6) The case of *Purcell against M'Namara* affords another instance of a material variance. (7) The two following are cases in which the variances were considered to be immaterial. On the trial of an action for maliciously indicting the plaintiff for an assault, it appeared that the charge, as stated in the warrant, was for violently assaulting the defendant; whereas the charge alleged in the declaration was for assaulting and beat-

(1) *Reed v. Taylor*, 4 Taunt. 616.

(5) See vol. i. p. 213.

(2) 1 T. R. 518. 9 East, 363. Bull. N. P. 14.

(6) *Woodford v. Ashley*, 2 Campb. 193.

(3) *Purcell v. M'Namara*, 9 East, 361.

(7) 9 East, 157., stated in vol. i. p. 214.

(4) By *Gibbs C. J.*, 5 Taunt. 583.

ing, and the charge, proved by witnesses to have been brought before the magistrate, was for assaulting and striking; the Court of Common Pleas held, that as the declaration did not profess to describe the warrant, and had represented the charge correctly in substance, the variance was not material.(1) In another case, where the declaration alleged that the defendant charged the plaintiff with felony, and, in support of this allegation, the information before the magistrate was produced, which contained in substance an assertion, that a felony had been committed, and that the defendant had good cause to suspect and believe, that the plaintiff had stolen the property, the Court of King's Bench held, that the information, according to the common understanding of mankind, and as it was understood by the magistrate, amounted to a *charge* of felony against the plaintiff, and was therefore sufficient to sustain the allegation.(2)

The defendant, under the general issue, may justify the proceedings against the plaintiff, and show that he had a probable cause for instituting them. If the charge against him was for felony, the defendant will be allowed, in his defence, to give evidence of the general bad character of the plaintiff(3); for in this case, where the point in issue is, whether the defendant acted from malice, and without probable cause, it is material to inquire into the situation of the parties, and whether the defendant had any reasonable ground for suspecting the plaintiff. Now, the notoriety of the plaintiff's character for dishonesty, is a circumstance of general suspicion, not to be disregarded. In certain cases, especially if the plaintiff's conduct has been suspicious on the particular occasion in question, a man with the fairest and best intentions might be justified in acting upon such grounds, and might have strong reason for proceeding against a person of such a notorious character.

Evidence  
under general  
issue.

(1) *Byne v. Moore*, 5 Taunt. 189.

(2) *Davis v. Noak*, 1 Starkie, N. P. C. 377. 382.

(3) *Rodriguez v. Tadmire*, 2 Esp. N. P. C. 720. And see 12 Rep. 92. 2 Inst. 51, 52. In a similar case,

Mr. Baron Wood held, that the defendant's counsel could not enquire, whether the plaintiff was a person of suspicious character; *Newsam v. Carr*, 2 Starkie, N. P. C. 69.

An inquiry into particular facts, with a view to reflect on the plaintiff's character, is not to be allowed. The evidence given by the defendant in support of an indictment, which he prosecuted against the plaintiff, and which is charged in the action to be malicious, has been thought admissible; as also the evidence of the defendant's wife on the same occasion. (1)

2. Action for  
malicious  
arrest.

The proof of malice, and of the want of a probable cause, will be equally necessary in an action for maliciously arresting the plaintiff and holding him to bail. (2) The writ also (3), the arrest, and the determination of the suit in which the writ was sued out, must be proved; and the proof of the several proceedings ought to correspond with the averments in the pleadings.

The return of the sheriff upon the writ is evidence of the truth of the fact stated in the return, as well against the defendant as against the sheriff himself (4); though it seems once to have been thought otherwise in a *nisi prius* case upon this subject. (5)

A rule of court, by which the defendant had leave to discontinue on payment of costs, together with proof that the costs were taxed and paid, is good evidence of the determination of the suit; where there is merely a writ followed up with a discontinuance, the judgment is not entered. (6) But an order of a Judge, to stay proceedings on payment of costs, seems not to be sufficient evidence of the determination, though the costs have been paid under the order: Lord Kenyon declared his opinion to that effect in the case of *Kirk v. French* (7); and this opinion being cited in the case of *Bristow*

(1) See vol. i. p. 71.

(2) See ante, p. 168.

(3) As to proof of writs, see vol. 1. part 2. c. 5.

(4) See vol. i. part 2. c. 5.

(5) *Lloyd v. Harris, Peake*, N. P. C. 174., before Lord Kenyon.

(6) *Bristow v. Haywood*, 4 Campb. 214.

(7) 1 Esp. N. P. C. 80. An order of the Lord Chancellor, directing a commission of bankrupt to be superseded, is not sufficient proof of its being duly superseded; the writ of supersedeas under the great seal ought to be produced; by Lord Ellenborough, *Poynton v. Forster*, 3 Campb. 60.

v. Haywood, Lord Ellenborough said, a Judge's order to stay proceedings might not be enough to show the cause determined: and then pointed out the distinction between such an order and a rule of court.

Though an allegation, that the plaintiff had been arrested for a certain sum, and detained till he gave bail, &c. is not supported to its whole extent, by merely proving that on being arrested he paid the money and costs without giving bail; yet, if the arrest is proved to be malicious and without probable cause, the plaintiff will be entitled to a verdict and to damages for the arrest. (1)

In order to show, that the plaintiff was maliciously held to bail, in an action brought against him by the defendant, the plaintiff cannot call an arbitrator, to whom that cause had been referred, to prove, that there was no cause of action, and nothing due from him to the defendant, if the arbitrator examined the parties to the suit, or inspected the defendant's books; Lord Kenyon said, he thought the arbitrator ought not to be permitted to disclose what transpired before him, either upon the examination of the parties themselves, or on an inspection of the books of the plaintiff (the defendant in the second action), upon the principle, that the parties themselves could not have been examined in the former cause, nor could the plaintiff be compelled at *nisi prius* to produce his books. (2)

(1) *Bristow v. Haywood*, 4 Campb. 213.

(2) *Habershon v. Troby*, 3 Esp. N. P. C. 39.

## CHAP. XI.

### *Of Evidence in an Action of Trover.*

THE action of trover is a special action on the case, to recover the value of personal goods, which the defendant has wrongfully converted to his own use. . And the declaration,

in its general form, (when the plaintiff does not sue in a particular character, as executor, or assignee of a bankrupt, &c.) states shortly, that the plaintiff was lawfully possessed of the goods in question, as of his proper goods and chattels, and that being so possessed he lost them, and that afterwards they came to the hands and possession of the defendant, who converted them to his own use.

**Proof of property.**

The plaintiff, in support of this action, will have to prove, that, at the time of the conversion, he had either the absolute property in the goods, or at least a special property, (such as a carrier has, or a consignee, or factor, who are responsible over to their principal;) and further he must show either his actual possession of the goods, or his right to immediate possession, and that the goods have been wrongfully converted by the defendant. (1) The mere possession of goods is sufficient to enable the possessor to maintain this action against a wrongdoer, who has taken them away or wrongfully detains them. The case of the chimney-sweeper's boy, who found the jewel, is a well-known instance in illustration of this principle. (2)

**Variance between proof and the declaration.**

If the possession of the goods, or right of possession, is not proved as stated in the declaration, the plaintiff will fail; as, where the plaintiff sued as assignee of two partners, and the declaration stated, that the partners were possessed of the goods, but it appeared that some of the goods had never belonged to the partnership, but exclusively to one of the partners; Lord Kenyon held, with respect to these goods, that the plaintiff could not recover. (3)

**Proof of conversion.**

The plaintiff is also to prove a wrongful conversion of the goods by the defendant, this being the main bearing of the

(1) As to the nature of this action, and in what cases it is the proper remedy, the reader is referred to Selwyn's Abridgment of the Law of Nisi Prius, and the notes in Mr. Sergeant Williams's edit. of Saunders's Reports.

(2) *Armory v. Delamirie*, 1 Str.

505. See also *Webb v. Fox*, 7 T. R. 391. *Fowler v. Down*, 1 Bos. & Pull. 44. *Laroche v. Wakeman*, Peake, N. P. C. 140.

(3) *Cock*, assignee of *Kent and Pemberton*, v. *Tunno*, Selw. N. P. 1308.

action. And if it appear from the evidence, that the defendant wrongfully took the plaintiff's goods, it is an actual conversion, and no demand need be proved. (1) Or if the goods are left by the plaintiff in the possession of the defendant, who refuses to deliver them up, this is also an actual conversion. "The very denial of goods to him, who has a right to demand them, (said Lord Holt in the case of *Baldwin v. Cole*) (2), is an actual conversion, and not only evidence of it, as has been holden: for what is a conversion, but an assuming upon oneself the property and right of disposing of another's goods; and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them." As to the time and place of the conversion, it is scarcely necessary to observe, that in this transitory action the plaintiff will not be confined to the place or day specified in the declaration.

Where the goods come into the defendant's possession by finding, or by delivery from a third person, it will be sufficient, in the first instance, to prove a demand on the part of the plaintiff, and a refusal by the defendant. (3) The demand and the refusal are not an actual conversion, but evidence only of a conversion; if therefore it appears, that the defendant has not been guilty of a conversion, (as, in the case of a carrier or wharfinger, when the goods are proved to have been lost through negligence or stolen, or detained on account of a refusal to pay for the carriage or wharfage,) (4) there the proof of a demand and non-compliance are explained, and amount to nothing; the circumstances of the case negative the fact of conversion.

If the goods do not appear to have been ever in the defendant's possession, his refusal is not evidence of an actual wrong-

(1) *Bruen v. Roe*, 1 Siderf. 264.  
(3) 6 Mod. Rep. 212., cited by Lord Ellenborough in *McCombie v. Davis*, 6 East, 540. *Bloxam v. Hubbard*, 5 East, 407.

(5) *Bruen v. Roe*, 1 Siderf. 264. Bull. N. P. 44. *Severin v. Keppell*, 4 Esp. 157. *Gilb. Ev.* 224.

(4) 2 Salk. 655. Bull. N. P. 44. *Ross v. Johnson*, 5 Burr. 2825. And see other examples in *Severin v. Keppell*, 4 Esp. N. P. C. 157. *Green v. Dunn*, 5 Campb. 215. *Solomons v. Dawes*, 1 Esp. N. P. C. 83. *Smith v. Young*, 1 Campb. 439.

Demand and refusal.

ful conversion; to make a demand and refusal sufficient evidence of a conversion, the party, when he refuses, must have it in his power to deliver up, or to detain the article demanded. (1) A refusal to deliver, by the general agent and servant of the defendant, will not make the defendant guilty of a tort, unless, in the particular fact of the refusal, he acted under the defendant's special directions (2); the servant himself, who has intermeddled with the property of another and disposed of it, though he may have acted ignorantly and for the master's benefit, is still liable in trover; and if his master had no authority to dispose of the property, the servant cannot justify what he has done, as having acted under his authority. (3)

**Demand in writing.**

If a demand of the property has been made in writing, and a verbal demand is made at the same time, but not referring to the written, and complete in itself, the demand may be proved in either form. (4) It has been held, that a written demand of the goods, or of the amount of the sale, having been left at the defendant's house, is sufficient, and that it is not necessary to make a personal demand. (5)

**Trover for written document.**

In an action for a bond, or other document in writing, the description of the bond, as proved, must correspond with that in the declaration in point of date, sum, and other particulars; which is the reason, why a very general description on the record will suffice. (6) The plaintiff in this action will be allowed to give parol evidence of the contents of the document, to support the general description in the declaration, without having given a previous notice to the defendant to produce the original. (7)

(1) *Smith v. Young*, 1 Campb. 440. The defendant in this case, in answer to a demand, said, he would not deliver the lease (the article in question), that it was then in the hands of his attorney, who had a lien upon it for a small sum of money due to him.

(2) *Pothonier v Dawson*, Holt, N. P. C. 384.

(3) *Stephens v. Elwall*, 4 Maule & Selw. 261.

(4) *Smith v. Young*, 1 Campb. 440.

(5) *Logan v. Houlditch*, 1 Esp. N. P. C. 22. *Thompson v. Shirley*, 1 Esp. N. P. C. 31.

(6) *Wilson v. Chambers*, Cro. Car. 262. 3 Bos. & Pull. 145, 146.

(7) *How v. Hall*, 14 East, 274.



Where the action is for converting a ship, the mere fact of the plaintiff's possession, as owner, is sufficient *prima facie* evidence of ownership, against a wrongdoer. And though he may have gained possession under a bill of sale, which is absolutely void, still, if he has actual possession, he may maintain the action against a person who has no colour of right. (1) But in many cases it will be necessary to give documentary evidence of the plaintiff's title to the ship, (as, where the defendant claims it as his property, or where the additional evidence of title has been rendered necessary by some contrary proof on the part of the defendant,) and then his title must be established by proof of a bill of sale, regularly executed, and conforming with the several requisites of the registry acts. (2)

Trover for a ship.

Under the general issue of not guilty, the defendant will be at liberty to prove his title to the property in question; for if the property belonged to him, he cannot be charged with a wrongful conversion. Or he may disprove the plaintiff's title, by showing that the goods belonged to another person, under whom he claims; thus, if he took the goods out of the plaintiff's possession, it will be a good defence in this action, that he took them by the order of one to whom they belonged. Or the defendant may prove, that the plaintiff had before recovered damages for a conversion of the same goods, in an action of trover against J. S.; for this recovery vests the property in J. S., and the plaintiff has damages in lieu of the goods; in a second action, therefore, he cannot say, they are his property. (3)

General issue.  
Defendant's evidence.

The defendant may also show, that he was joint tenant of the property with the plaintiff, or tenant in common, or parcener (4); one of these co-tenants cannot maintain trover

Proof of joint-tenancy, &c.

(1) Sutton v. Buck, 2 Taunt. 302. Robertson v. French, 4 East, 136. The case of Sheriff v. Cadell, 2 Esp. N. P. C. 616., must be considered as over-ruled.

(2) See evidence in action on policies of insurance, *supra* p. 55.

(3) Adams v. Broughton, 2 Str. 1078.

(4) 2 Leon. Rep. Cas. 278. Bull. N. P. 34. Barnardiston v. Smith, 4 East, 121. n. Holliday v. Cammell, 1 T. R. 658., and the other cases collected in Selw. N. P. 1204.

against another, on account of the unity of possession, which subsists between them; but if one joint tenant, or tenant in common, or parcener, destroy the common property, he will then be liable to this action. (1) The defendant cannot, under the general issue, give evidence of a joint tenancy, or tenancy in common, between the plaintiff and a third person (2); but as the plaintiff can only recover damages for the value of his share of the property (3), such evidence is admissible, for the purpose of ascertaining the amount of damages.

Evidence in answer to proof of demand and refusal.

If the evidence of conversion is, that the defendant refused to deliver the goods on the demand of the plaintiff, the defendant, in answer to this, may show, that, at the time of the demand, the goods were lost or stolen out of his possession (4), or taken out of his custody under an execution (5); or that he refused, on the ground of the plaintiff not being the true owner (6); or that the goods were out of his possession and power, without his default (7); or that in fact there was no conversion, and that plaintiff might at any time have taken possession of them, if he had chosen; or that the act, which is charged against him as a wrongful conversion, was from necessity, (as, where the defendant, the master of a ship, threw the goods into the sea, in order to prevent the ship from sinking) (8); or that the goods were damaged by misfortune, while the defendant interfered with them only for the purpose of assisting and benefiting the owner, as, where he took the plaintiff's boat to go over to his own boat, which was in the care of the plaintiff and then on fire, for the purpose of putting out the fire, and, as he was passing over, the plaintiff's boat sunk. (9)

(1) Co. Litt. 300. a. *Barnardiston v. Smith*, 4 East, 121. n. Bull. N. P. 34. *Graves v. Sawcer*, Sir T. Raym. 15. *Fennings v. Ld. Grenville*, 1 Taunt. 241.

(2) *Nelthorpe v. Dorrington*, 2 Lev. 113. *Brown v. Hedges*, 1 Salk. 230.

(3) *Nelthorpe v. Dorrington*, 2 Lev. 113. Bull. N. P. 35.

(4) Bull. N. P. 44, 45. *Ross v. Johnson*, 5 Burr. 2825.

(5) 1 Com. Dig. tit. Trover, (E).

(6) Bull. N.P. 46.

(7) 1 Com. Dig. tit. Trover, (E).

(8) *Bird v. Astcock*, 2 Bulstr. 280

(9) *Drake v. Shorter*, 4 Esp. N. P. C. 166.

In answer to the proof of a demand and refusal, the defendant may show, that he had a right to detain them under a lien. But this will not be a good defence, if the plaintiff, at the time of the demand, made a formal tender of satisfaction, offering to discharge the defendant's claim. And if the defendant insisted on his right to detain the goods, not on the ground of his having a lien upon them, but on some other ground quite distinct, (as, on the plea, that the goods were his property,) without noticing his claim of a lien, he cannot at the trial, for the first time, resort to such a defence, which he must be understood to have waved. (1) And a general right of detaining goods may be waved by a special agreement between the parties respecting the time and mode of payment; but not by an agreement merely for the payment of a specific sum, without any stipulation as to the time or mode of payment. (2)

The right of a general lien, that is, of a lien for the general balance, is founded on a contract between the parties, either expressed or implied. Such a lien may be established by evidence of an express contract between the parties, in the particular instance; or a contract may be collected from the usual course of dealing between the parties, for where there is evidence of prior dealings upon the footing of such an extended lien, the jury may reasonably presume, that they continued to deal upon the same terms. (3) Or a particular contract may be implied from the fact of the plaintiff having previously received a formal notice, that the defendant would not deal with any one, unless under the express condition of a general lien (3); here the terms, on which the defendant insists, must be traced distinctly to the knowledge of the other party (4); the proof of an advertisement to this effect in a public paper, without proof of its being seen by the plaintiff, will not be sufficient. (5)

Lien.  
Proof of  
general lien.

(1) Boardman v. Sill, 1 Campb. 410. same parties, 7 East, 224. Aspinall v. Pickford, 3 Bos. & Pull. 44. n. (a).  
(2) Chase v. Westmore, 5 Maule & Selw. 180. 186. (4) Kirkman v. Shawcross, 6 T.R. 15.  
(3) Rushforth v. Hadfield, 6 East, 519. Another case between the (5) Boydell v. Drummond, 11 East, 144. n.

A contract for a general lien may be inferred also from the general dealings of other persons engaged in the same employment; with respect to which it may be observed, that the dealings must be so general, so long established, and of such notoriety, that they may be presumed to have been known to the one party at the time of his dealing with the other; whence the inference is to be drawn, that these parties dealt upon the same footing as all others, with reference to the known usage of the trade. (1) The proof of the general usage of trade, as a foundation for the claim of a general lien, will be required to be stronger and fuller in some cases than in others; in the case of a carrier, for instance, who sets up such a claim, more decisive evidence of a long established usage is necessary than in the case of wharfingers, whose right has been often acknowledged in courts of law. The carrier's claim of a lien for the general balance is not founded on the common law, and has been watched with great jealousy (2): he ought therefore to make out a very strong case, on cogent proof of ancient, numerous, and important instances, in which the claim has been allowed. These particular instances will be open to much observation; they may not be old, or not numerous; or the circumstances of the parties may not be well understood, or private rights might have been waved; or it might happen, that parties would be glad to pay small sums due for the carriage of former goods, rather than incur the risk of a great loss by the detention of other goods of much higher value; or the instances may have been in the case of solvent persons, who were liable at all events to answer for their general balance; or perhaps the instances have not been brought home to the knowledge of the party, against whom the claim is now made. (3)

Trover by  
executor or  
administrator.

If the action is brought by a rightful executor or administrator, against an executor de son tort, the defendant cannot plead payment of debts to the value of the goods in question,

(1) *Rushforth v. Hadfield*, 6 East, 519. 7 East, 224.

(2) 7 East, 230. 6 East, 528.

(3) See 7 East, 228.

or that he has given the goods in satisfaction of debts; but, upon the general issue, these payments shall be recouped in damages. (1) Mr. Justice Buller has even said, that if such payments amount to the full value, the plaintiff ought to be nonsuited (2); this, however, is not warranted by the case in *Carthew*, and appears not to be correct.

In trover, as in trespass, some may be found guilty, and others acquitted; but all the defendants cannot be found guilty, unless a joint conversion is proved against all; several acts of conversion will not make them jointly guilty. But there may be a joint conversion, by construction of law, as well as in fact. An assent by some of the defendants to a conversion by the others will make them wrong-doers equally with the rest, provided the conversion was for their use and benefit, and that they were in a situation to have originally commanded the conversion; in such a case, the maxim of law applies, "*Omnis rati habitio retrotrahitur, et mandato æquiparatur.*" (3)

Trover against several defendants.

(1) *Whitehall v. Squire*, *Carth.* 104. 4 East, 447.

(2) *Bull. N. P.* 48.

(3) 4 Inst. 317. See action of trespass, *infra* p. 188. (5.) *Nicoll v. Glennie*, 1 Maule & Selw. 588.

## CHAP. XII.

### *Of Evidence in an Action of Replevin.*

THE next action to be treated of is the action of replevin, in which the plaintiff complains of an unjust taking and detention of his goods and chattels. The principal subject of controversy in this action is, whether the taking can be justified; for with respect to the mere detention, that can scarce ever be a ground of complaint, excepting where the arrears of rent, or amends for the damage, have been tendered to the distrainer.

Non cepit.

The general issue in replevin is *non cepit*, in other words, whether the defendant took the cattle or goods, or any part of them, in the manner in which the plaintiff complains. This issue admits the property to be in the plaintiff, and disputes only the caption. If the defendant means to dispute the point of property, he ought to plead it; for he will not be allowed to disprove the ownership under an issue, which only denies the taking.

Place of taking.

The declaration names a particular place, in which the goods were taken; if therefore at the trial, it should appear that the goods were not originally taken in that place, nor afterwards carried thither by the defendant, the plaintiff has failed in proving a part of his charge, and will be nonsuited. (1) But if the plaintiff prove, that the goods were in the defendant's possession at the place described in the declaration, he has proved as much as is necessary upon this issue: for though the defendant originally took them at another place, yet if he took them wrongfully at first, the wrong is continued in every place where he afterwards detains them. (2) When it is therefore proved, that the defendant had the goods in his possession at the place mentioned in the declaration, evidence of his having originally taken them in another place would be irrelevant and inadmissible. The same remark applies to the case, where the defendant pleads, that he took the goods in another place, traversing the place named in the declaration, upon which traverse the plaintiff takes issue; proof of the goods having been in the defendant's possession, at the place named in the declaration, will maintain the issue, wherever they may have been originally taken.

Avowry.

An avowry admits the plaintiff's property and the taking of the distress, but justifies the taking, and sets forth the cause of the distress in order to have a return. So that, in effect,

(1) *Johnson v. Wollyer*, 1 Str. 507. Bull. N. P. 54. Here there was no taking whatever in the place named in the declaration. See *Aber-*  
*crombie v. Parkhurst*, 2 Bos. & Pull. 481.  
 (2) *Walton v. Kernop*, 2 Wils. 354.

both parties are actors; the plaintiff, to have damages for the taking and detaining of his goods; the defendant the avowant, to have a return of the goods and damages. Avowries are for rents, services, heriots, &c., or for taking cattle damage-feasant.

If the plaintiff, in bar to an avowry for taking his cattle damage-feasant, plead a right of common over the place, the right of common must be proved substantially as averred. The proof must at least be commensurate with the claim. Thus, where the issue is on the levancy and couchancy of the cattle, it would not be sufficient to prove, that only a part of the cattle were levant and couchant. (1) Or, if the plaintiff prescribe generally for common for commonable cattle, evidence of a right of common only for some particular species of commonable cattle will not maintain the issue. (2)

Plea in bar.  
Right of com-  
mon.

But though the plaintiff will be obliged to prove as much as he claims, he will not be precluded from recovering by proving a more ample right. Thus, evidence of a right of common for cows, as well as for sheep, will support a plea prescribing for common only for sheep. (3) When a party prescribes absolutely, and proves a prescriptive right subject to a condition or limitation, the sufficiency of the proof, to maintain the issue, seems to depend upon this, whether the condition or limitation is part of one entire prescription, or whether it is not another distinct prescriptive right, and the subject of another action, rather than a part of the prescription alleged. (4) In the case of *Brook v. Willet* (5), where a prescriptive right of common appurtenant was claimed for a certain number of sheep every year and *at all times of the year*, and this general right was proved, but it also appeared that the

(1) *Sloper v. Allen*, 2 Roll. Ab. 722. *Bailiffs of Tewkesbury v. Bricknell*, 1 Taunt. 142.  
706. tit. Trial (c. 41.). Bull. N. P. 299.

(2) *Pring v. Henley*, Bull. N. P. 59. *Lovelace v. Reynolds*, Cro. El. 546.  
And see *Rotherham v. Green*, Cro. El. 593. Bull. N. P. 60. 1 Campb. 563. Bull. N. P. 59. *Laughton v. Ward*, 1 Lutw. 111. *Ballard v. Dyson*, 1 Taunt. 279.

(3) *Bushwood v. Pond*, Cro. El. (5) 2 H. Bl. 224

tenant of an adjoining farm was entitled to have the sheep folded on his lands, whenever they were fed on the common, an objection was taken on the ground of a variance between the plea and the proof: but the Court of Common Pleas on consideration held, that the words "*at all times*" must be understood according to the subject-matter and the general course of feeding sheep, which seldom, if ever, remained during the night on the common, but were folded; these words must therefore be understood as meaning *at all usual times*; and the folding of the sheep at night was not part of one entire prescription for common of pasture, but rather a consideration subsequent to the enjoyment of the right, and not necessary to be stated.

**Witness.**

Where a right of common is claimed by custom, one who claims under the same custom is not a competent witness in support of the claim, as he might afterwards use the record in his own cause, to establish a similar customary right for himself. (1) But when the issue does not affect any customary right, and is merely on a right of common claimed by prescription, as belonging to the estate of A., one who claims a prescriptive right of common, as appurtenant to his own estate, may be a witness; for though A. may have such a right of common, it does not follow that B. has, nor would the verdict in the action of A. be evidence in B.'s action. (2) The admissibility of the declarations of deceased persons, on the subject of customary rights, has been before considered (3); and nothing material occurs in this place worthy of remark.

**Non dimisit.  
Non tenuit.**

The most usual pleas, in bar to an avowry for arrears of rent, are, that the avowant did not demise, or that the plaintiff did not hold, in manner and form as the avowry alleges.

(1) 1 T. R. 302. 3 T. R. 32. Bull. N. P. 283. Hockley v. Lamb, 1 Ld. Raym. 731. And see Anscomb v. Shore, 1 Taunt. 261., stated in Treat. on Ev. vol. i. p. 57. (2) 1 T. R. 302. Bull. N. P. 283. Harvey v. Collison, MS. case cited 2 Selw. N. P. 1074. (3) Treat on Ev. vol. i. p. 249.



Under these pleas, the plaintiff will not be allowed to prove that the landlord, under whom he gained possession, had no right or title to demise the premises; for he could not plead it in bar to the avowry, the plea of *nihil habuit in tenementis* having been taken away by the statute 11 G. 2. c. 19. s. 22., which permits the landlord to avow generally, without setting forth the demise or his title (1); and, as he cannot plead such matter, so he cannot give it in evidence under the plea of *non dimisit* or *non tenuit*. The tenant cannot even controvert his landlord's title to let the premises, although the landlord may have obtained possession by fraud. (2) It seems also, that he cannot controvert the tenure, as long as he continues in possession of the premises under the avowant, who first let him into the possession. (3) If indeed the plaintiff was not in the first instance let into possession by the defendant, although he has since paid rent to him, he will be at liberty to prove, under the plea of *non tenuit*, (in answer to the *prima facie* case on the other side from the payment of rent,) that the defendant was not entitled to such rent. This appears from the case of *Rogers v. Pitcher* (4); there the plaintiff first held an estate as tenant to A. B., and afterwards paid rent to the defendant, who had sued out a writ of *elegit* against A. B., and had a moiety of the estate delivered to him, but A. B., previously to the defendant's judgment and the suing out of the *elegit*, had conveyed the premises to C. D. in satisfaction of a debt, so that C. D. was after the conveyance clearly entitled to distrain on the plaintiff for the rent; the Court of Common Pleas determined, that the payment of rent to the avowant, though it raised a presumption of title, yet having been made in ignorance of the conveyance to C. D., could not make the plaintiff irretrievably tenant to the avowant, and that the presumption of title had been sufficiently rebutted.

In support of an issue upon the plea of *non tenuit modo et formâ*, it will not be necessary to prove the plaintiff's holding

(1) *Sullivan v. Stradling*, 2 Wils. 208.

(3) See the judgment of Gibbs, C. J. in *Rogers v. Pitcher*, 6 Taunt. 209.

(2) *Parry v. House*, Holt, N. P. 489.

(4) 6 Taunt. 209.

for the precise time mentioned in the avowry. Thus in the case of *Forty v. Imber* (1), where the defendant made cognizance for rent for two years and a quarter, and alleged that the plaintiff held and enjoyed the premises for a long time, viz., for two years and a quarter ending at a certain period, to which the plaintiff pleaded, that he did not hold and enjoy the premises in manner and form, &c., the Court of King's Bench held, that proof of a holding for only two years ending at such time entitled the defendant to a verdict on this issue. "There has been no case since the statute, said Lord Ellenborough, (meaning the st. 11 G. 2. c. 19.) where, if it turned out that less rent was due than the defendant had avowed for, he has not been holden to be entitled to recover for so much as was due."

No rent in  
arrear.

Where the plaintiff pleads generally that no rent is in arrear, he cannot, under this issue, prove a payment of the rent, under a threat of distress, to one who had a superior title; but he ought to plead the matter specially, as was done in the case of *Taylor v. Zamira*. (2) If the point in issue is, whether a certain sum (the rent specified in the avowry), or any part of it, is in arrear, proof of a smaller sum being in arrear will be sufficient to entitle the avowant to a verdict (3), and the rule is the same, where the issue is merely as to a specific sum being in arrear, for the substance of the issue is to ascertain, whether rent to any amount is in arrear. (4)

Traverse of  
being bailiff.

If the plaintiff traverse the averment in the cognizance, of the defendant being the bailiff of J. S., the authority must be shown: and for this purpose, it will not be indispensably necessary to prove an appointment previous to the distress, but proof that J. S. assented to the distress, which had been taken for him, though it was taken without his knowledge, will be sufficient; for the subsequent agreement by J. S. to the

(1) 6 East, 434.

(2) 6 Taunt. 524.

(3) *Harrison v. Barnby*, 5 T. R.

248. See 2 Barn. & Ald. 249.

(4) *Cobb v. Bryan*, 3 Bos. & Pull.  
348.

distress amounts to an authority, as much as if he had previously directed the defendant to distrain. (1)

If a tender of amends is pleaded, it must be pleaded as having been made to the person, for whose benefit the distress was taken, and not to the bailiff; and the proof must agree with that averment. A tender to the bailiff when the principal is present, will not maintain the plea, the derivative power of the bailiff being then determined; and the tender should be made to that person, to whom the amends belong, and who was ready to receive them. Yet if the distress was taken by the bailiff in the absence of the lord, and if the bailiff is proved to be his usual receiver, in this case a tender of amends to the bailiff seems to be equivalent to a tender to the lord himself. (2)

In the case of an avowry or a cognizance for rent in arrear, the defendant ought to be furnished with evidence not only of the amount of arrears, but also of the value of the goods or cattle distrained, in order to guide the judgment of the jury; the statute of the 17 C. 2. c. 7. having enacted, that if the plaintiff shall be nonsuit after cognizance or avowry and issue joined, or if the verdict shall be given against the plaintiff, then the jurors, impannelled to inquire of such issue, shall at the prayer of the defendant inquire concerning the sum of the arrears, and the value of the goods or cattle distrained, and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrears, or so much as the goods or cattle distrained amount to. If the jurors give a defective judgment, as if they find the value of the distress, but omit to find the sum of the arrears, the omission cannot be supplied by a writ of inquiry. (3)

(1) *Trevilian v. Pine*, 11 Mod. 112  
Goth. 109. Vin. Ab. tit. Bailiff D  
pl. 7.

(2) *Gilb. on Replevin*, 89.  
(3) See cases collected in 1 Selw.  
N.P. 1085.

## CHAP. XIII.

*Of Evidence in an Action of Trespass.*

THE action of trespass is brought to recover damages for an injury done either to the property, or to the person, of an individual. In treating of this subject, it is proposed to consider, first, the action for a trespass to real or personal property; secondly, that for a trespass to the person; thirdly, the action for a criminal conversation with the plaintiff's wife; and, fourthly, the action for debauching the plaintiff's daughter.

## SECT. I.

*Of Evidence in an Action for a Trespass to Real or Personal Property.*

THE action for breaking and entering the plaintiff's close is founded upon possession; and though title may, and often does, come into question, yet there is nothing in the form of the action to make it necessary; and possession alone, without a legal title, is sufficient to maintain the action against a wrong-doer.

*Proof of actual possession.*

The plaintiff, in this action, will have to prove himself in the possession of the premises at the time, when the injury was committed. The action cannot be maintained, unless the plaintiff have actual possession, although he may have the freehold in law. An heir at law cannot, before entry, bring trespass against an abater (1); neither can a bargainee before entry, though the possession is transferred to him by the statute of uses. (2) Upon the same principle, a lessee (3), or

(1) 2 Roll. Ab. 553. l. 45. Com. Dig. tit. Trespass (B 3.)

(3) Perkins, 603. p. 261. Bac. Ab. tit. Lease (M).

(2) Vent. 361. Com. Dig. tit. Trespass (B 3.).

an assignee of a lessee (1), cannot maintain this action before making an entry upon the demised premises; though, for other purposes, such as assigning or underletting, &c., they may be considered as being in possession. A parson after induction may maintain this action for the glebe land, though he has not actually entered upon that part; the act of induction putting him into possession of a part for the whole. (2)

Persons continuing in possession of an estate after the determination of their interest, are in certain cases declared by the law to be trespassers, and in such cases the plaintiff may maintain the action of trespass, though he has not had possession. Thus the statute 6 Ann. c. 18. s. 5., provides, that every person, who, as guardian or trustee for an infant, and every husband seized in right of his wife only, and every other person having any estate determinable upon life, who, after the determination of that estate or interest, without the express consent of the person immediately entitled upon the determination, holds over and continues in possession of any lands or tenements, shall be adjudged to be trespassers; and every person, so immediately entitled, or his executors or administrators, may recover in damages, against the person holding over, the full value of the profits received during the wrongful possession.

There is a distinction, with respect to the necessity of actual possession, between the action of trespass for breaking and entering upon lands or tenements, and the action for taking and carrying away goods. In the latter case, proof of actual possession will not be absolutely necessary: if the plaintiff has the exclusive right of possession, that gives him a constructive possession, which will be sufficient to maintain this action; but he must have the one or the other, either the actual possession at the time when the act was done, or the constructive possession in respect to the right actually vested

(1) By Holt C. J. *Cook v. Harris*, 1 Lord Raym. 367.      (2) *Bulwer v. Bulwer*, 2 Barn. & Ald. 470.

in him. (1) Many instances of the latter kind might be cited; as, where an estray, or wreck, has been taken by a stranger, before seizure by the lord of the manor (2); or where goods have been taken after the owner's death, and before they came into the hands of the executor. (3)

Trespass by  
the act of  
another.

Proof that the defendant procured or commanded the trespass, will be sufficient to support the action against him, though he was not present at the time (4); or that he afterwards assented to a trespass, which had been committed for his use or benefit, though not privy at the time when the act was done (5); or that he was present, aiding and abetting the person, who committed the trespass, though he did nothing. And, as in trespass, for breaking a close and depasturing cattle, the plaintiff may prove, that the defendant's servant drove the cattle into the close; so the defendant may show, that it was done against his order or consent. (6) The servant is not a competent witness for this purpose; for the defendant, in case the plaintiff should recover against him, may afterwards bring an action against his servant, and use the verdict in evidence against him as a measure of the damages, which he has sustained in consequence of his wrongful act. (7)

Special  
damages.

Many things, says Mr. Justice Buller, may be laid in aggravation of damages, for which alone trespass would not lie (8); and in considering, what may be specially laid and proved in aggravation, he makes a distinction between cases, where the special damage may be made the subject of a distinct action, and where it cannot; he says, "the plaintiff (that is, as appears from the context, the plaintiff in an action for entering the house,) cannot recover damages for losing the service of his

(1) *Smith v. Milles*, 1 T. R. 480.

(2) *Fitz. N. B.* 91. 1 T. R. 480.

(3) 2 *Bulstr.* 268. *Com. Dig.* tit. *Trespass* (B 4.)

(4) 2 *Roll. Ab.* 555. l. 10. *Com. Dig.* tit. *Trespass* (C 1.)

(5) 4 *Inst.* 317. *Com Dig.* Ib.

(6) 2 *Roll Ab.* 682. tit. *Evidence*, (E.) 4. See *supra*, p. 185. and p. 179.

(7) See vol. i. p. 60.

(8) *Bull. N. P.* 89. *Russell v. Corn*, *Rep. temp. Holt*, 699. 6 *Mod.* 127. S. C. *Newman v. Smith*, *Rep. temp. Holt*, 699. 2 *Salk.* 642. S. C.

child or servant, because he may have a proper action for that purpose; nor can that be given in evidence." (1) However, this distinction is not supported by the modern practice. The rule, now generally adopted, seems to be, that, if the special damages, laid in the declaration, arise out of the trespass committed in entering the house, and the acts done by the defendant, to cause such special damages, constitute a part of one entire transaction, of which the trespass in the house was the commencement, the plaintiff will be allowed to prove them, notwithstanding that they might have been a sufficient ground for a separate action. For instance, in an action of trespass for breaking and entering the plaintiff's house, and there beating the plaintiff's servant, or debauching his daughter, the loss of service, or the seduction, may be proved in aggravation of damages; for the assault upon the servant, and the seduction, are part of the same illegal transaction, and completed during the continuance of the original trespass. In the late case of *Bracegirdle v. Orford* (2), (where the declaration was for breaking and entering the plaintiff's house, and without any probable cause, and under a false charge and assertion that the plaintiff had stolen property of the defendant, searching and ransacking, &c., by reason of which the plaintiff was not only interrupted in the quiet enjoyment of his house, but his credit and character were injured, &c.) the Court held, that the trespass was the substantive allegation, and that the rest was laid as a matter of aggravation only; and, though the false charge is not to be left to the jury as a distinct and substantial ground of damages, yet all the circumstances attending the trespass may be properly proved, and the jury will take the whole together into their consideration, in estimating the damages. "It is always the practice," said Mr. Justice Le Blanc, "to give in evidence the circumstances, which accompany and give a character to the trespass."

The declaration concludes by charging generally, that the defendant did other wrongs to the plaintiff to his great da-

(1) Bull. N. P. 89. And see *Osborne's case*, 10 Rep. 150 b.

(2) 2 Maule & Selw. 77. 2 T. R. 166.

mage. Under this general averment, it has been held, that the beating or debauching of a servant may be given in evidence, though not specially laid in the declaration. (1) "You cannot," said Lord Holt, as the report of the case states, "give several distinct trespasses in evidence under the averment of *alia enormia* by way of aggravation, but you may give a trespass in evidence, when it is a continuation or consequence of the trespass declared on." Mr. Justice Buller seems to have been of the same opinion (2); he says, "if the principal matter will bear an action, you may give any thing in evidence in aggravation of damages, though formerly it has been holden otherwise." However, it seems to be the most convenient and safest rule, not to admit, under this general averment, proof of such facts as the debauching of a daughter, or beating of a servant, which are entirely unconnected in their nature, and distinct from the substantive ground of the action, (the trespass in entering the house,) though in point of time the one may have immediately followed the other. In an action for breaking into the plaintiff's close, and doing some other act to the injury of the plaintiff, the jury may consider not only the pecuniary damage sustained by the party, but also the malicious motives which led to the injury. (3)

Proof of  
locality of  
premises.

The action of trespass for breaking and entering a close or house is a local action; and therefore the locality of the premises ought to be proved, as described in the declaration. (4) In trespass for breaking and entering a dwelling-house in the parish of A., if it appear that the house is in the parish of B., the plaintiff cannot recover. And in an action of trespass, where the declaration consists of a single count, for entering a house in the parish of A., and taking the plaintiff's goods there, this is in its nature local, and must be proved as laid; the taking of the goods cannot be proved in another parish, as it might, if there were a second general

(1) By Holt C. J. Rep. temp. Holt, 699. 2 Salk. 642. 6 Mod. 127.  
(2) Bull. N. P. 89. citing the case of *Sippora v. Bassett*, 1 Siderf. 225. contra.

(3) 2 Starkie, N. P. C. 518.  
(4) As to cases of variances, see vol. i. p. 216.



count for such a taking. (1) If the plaintiff, either in the declaration, or in a new assignment, describe the close, in which the trespass is supposed to have been committed, by its name or by its abutments, the proof ought to agree with the description, and a material variance will be fatal; for instance, if the description be thus, "on the south abutting on the mill of A.," the plaintiff will have to prove a mill there, and that it was in the tenure of A. (2), this being a material part of the description. But if it should appear that a highway passes between the close and the mill, that would not be material (3); or if the close is described as abutting towards the east, but it proves to be north inclining to the east, it will be sufficient. (4) Extreme particularity and strictness, therefore, are not requisite in the proof of abutments. If the plaintiff declare upon a trespass in one acre, setting forth its abutments, and he proves a trespass in any part of that acre so abutted, the jury may find the defendant guilty as to that part. (5)

In an action of trespass *quare clausum fregit*, evidence of title, and of right of possession, is admissible under the general issue; as, a demise from the owner of the land (6); or the defendant may show, that the plaintiff's interest in the premises, which he had occupied under the defendant, had expired at the time of the supposed trespass (7); or, that the freehold and right of possession were in a third person, by whose command he entered. (8) Or the defendant may prove, that he was tenant in common with the plaintiff (9): or that a third person, by whose command he entered, was tenant in common with the plaintiff. (10) Such evidence falsifies the declaration, by showing that the defendant did not break the close, as is

Evidence under general issue.

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| (1) Smith v. Milles, 1 T. R. 479.                     | (8) Diersley's case, 1 Leon. 301.  |
| (2) Nowell v. Sands, 2 Roll. Ab. 673. Bull. N. P. 89. | 8 T. R. 403. Garre v. Fletcher, 2 Starkie, N. P. C. 71. The declarations of the owner, made after the trespass, are clearly not admissible, to shew authority given to the defendant. <i>Ib.</i> |
| (3) <i>Ib.</i>  | (9) Gilb. Ev. 204.   |
| (4) Roberts v. Karr, 1 Taunt. 501.                    | (10) Rosse's case, 3 Leon. 83. Gilb. Ev. 204.  |
| (5) Bull. N. P. 89.                                   |  |
| (6) Dodd v. Kyffin, 7 T. R. 354.                      |  |
| (7) Argent v. Durrant, 8 T. R. 403.                   |  |

stated in the declaration. (1) But the defendant, under this plea, cannot prove a licence from the plaintiff (2), or defect of the plaintiff's fences (3), or right of common (4), or right of way (5), or other easement (6); or that he entered to take his emblements or his cattle, or in aid of an officer in the execution of process, or in fresh pursuit of a felon, or to remove a nuisance; for all these are matters only of justification. And if the damage, complained of, arose from inevitable accident, or from the negligence of the plaintiff, such a defence ought to be stated on the record. (7) A distinction in this respect has been made between an action of trespass, and an action on the case. Thus, in an action for disturbing the plaintiff's right of common, the defendant may prove, under the general issue, that he has a right to depasture his cattle on the same common; for the averment, that the plaintiff could not enjoy in so ample a manner as of right he ought, is part of the issue. (8) And in an action on the case for a nuisance, a licence from the plaintiff may be given in evidence under the general issue. (9)

On the general issue, pleaded to a general count in the declaration, which charges the defendant with cutting down the posts of the plaintiff upon a certain close in M., without describing the close as belonging to the plaintiff, the defendant cannot justify cutting them down as being upon his own soil. (10) But if the count had described the close as the close of the plaintiff, there the declaration would be falsified by proving, that the defendant entered upon his own soil, though the posts, which he cut down, might have belonged to the plaintiff.

(1) *Gilb. Ev.* 221.

(2) *Gilb. Ev.* 216. 2 *T. R.* 166.

168.

(3) *Co. Lit.* 285. *a.* *Gilb. Ev.* 216.

(4) *Id.*

(5) *Gilb. Ev.* 217. 220.

(6) *Hawkins v. Wallis*, 2 *Wils.* 175.

(7) *Knapp v. Salisbury*, 2 *Camph. N. P. C.* 400.

(8) *Bennet v. Spinke*, 1 *Selw. N. P.* 393.

(9) *Winter v. Brockwell*, 8 *East*, 508.

(10) *Welch v. Nash*, 8 *East*, 394.

*Argent v. Durrant*, 8 *T. R.* 403.

The defendant could not formerly have proved under the general issue, that he entered to take a distress, for a rent charge. But this evidence is now admissible, by the statute 11 G. 2. c. 19. s. 21., which enacts, that in actions of trespass or upon the case, brought against any person entitled to rents or services of any kind, or against their bailiff or receiver or other person, relating to any entry, by virtue of this act, or otherwise, upon the premises chargeable with such rents or services, or relating to any distress or seizure, sale, or disposal of any goods or chattels thereupon, the defendant may plead the general issue, and give the special matter in evidence. This section does not extend to the case of the landlord seizing the goods of his tenant, which have been fraudulently removed off the premises to prevent a distress for rent in arrear; in such a case, therefore, he ought to plead specially, justifying the seizure by virtue of the first section of the same act. (1)

As in an action of trespass for entering upon the land of the plaintiff, so *à fortiori* in trespass for taking the plaintiff's goods, the defendant may, under the general issue, prove his title to the property. He may show, therefore, that he recovered in an action against the plaintiff, and that the goods in question were delivered to him in execution; or that they were given to him by a third person, to whom they belonged; for this is proof of title. In the case of *Badkin v. Powell and Chancellor* (2), where one of the defendants had detained the plaintiff's horses under pretence of their being an estray, and delivered them into the custody of the other defendant, who was the pound-keeper, one of the questions was, whether such evidence could be admitted on the part of the defendant under the general issue; it was objected, that if the defendant had intended to avail himself of his special authority as pound-keeper, he should have pleaded it by way of justification, as a gaoler must do, or any other

(1) *Vaughan v. Davis*, 1 Esp. N. P. C. 237. *Furneaux v. Fotherby*, 4 Campb. 136. (2) Cowp. 476.

person acting under a similar authority; but the Court held that the evidence had been properly received, and afforded a good defence; for here the defendant was not a trespasser, and therefore was not obliged to justify; and Mr. Justice Aston referred to a case, which determines (1), that, if an officer do not intermeddle, but only does what belongs to his office, he shall not be liable to any precedent tortious acts, of which he could know nothing. "A gaoler must justify," continued Mr. Justice Aston, "because a prisoner cannot be delivered to him without a warrant, and therefore he must state the warrant. But a pound-keeper has nothing to do with the taking; he has only to put the cattle into the pound; the instant they are in the pound, they are in the custody of the law; and if the pound is broken, the action is not to be brought by him, but by the person who distrained them."

Evidence under justification.

If the defendant justify under a grant of the close, (which term imports, in the abstract, the interest in the soil,) and it appear in evidence, that he has only a partial interest in the land, as the first crop of the produce, the issue on this plea must be found against him. (2)

Where the declaration is for several trespasses on the plaintiff's land on divers days, &c., to which the defendant pleads, that at the said several days he committed the trespasses by the leave and licence of the plaintiff, and the plaintiff replies that the defendant of his own wrong and without the cause by him alleged, &c., it will be necessary for the defendant to prove a licence coextensive with the trespass proved against him: and if the licence were given after one of the trespasses, the plaintiff must recover. (3) In this case, where the defendant says, in effect, that he had a licence for all the trespasses, the plaintiff could not reply in any other form; a new assignment would have been double.

(1) *2 Jones*, 214.

(2) *Stammers v. Dixon*, 7 East, 207.

(3) *Barnes v. Hunt*, 11 East, 451.

If the defendant plead his soil and freehold, and the plaintiff in his replication does not new assign, but traverses the plea, and at the trial it appear, that the defendant has a single acre in the vill, the issue is with him, whatever quantity of land the plaintiff may have there. So if the plaintiff in his replication should plead, that the close, named in the declaration and plea, had been enclosed for twenty years and more, and it were to appear in evidence, on the trial of an issue taken on this allegation, that any part of the close (common) had been enclosed within that time, the plaintiff would fail. (1) If the defendant justify entering, as commoner, upon part of the common, and it appear, that the common has been enclosed for twenty years, the right of entry is gone, and the defendant cannot support his justification. (2) If the defendant plead a right of way, the plaintiff may traverse the right, and give in evidence, that the way has been stopped by order of two justices: this order must pursue the form prescribed in the act of parliament; any material variance will render it invalid. (3)

Where the declaration contains two counts, one of which is for breaking and entering the plaintiff's house and expelling him, the other for expelling him from the occupation of his house, and the defendant justifies as to the breaking and entering, this justification covers the whole declaration, the expulsion being merely matter of aggravation; and if only one act of trespass is proved, the defendant justifies it as the trespass mentioned in the first count; if two trespasses should be proved, the defendant may apply the justification to whichever of the trespasses he chooses. (4)

The plaintiff, by making a new assignment of another and different place from that mentioned in the plea, waves and abandons the trespasses, which the defendant has justified. Evidence under new assignment.

(1) *Hawke v. Bacon*, 2 Taunt. 159.

(2) *Creach v. Wilmot*, 2 Taunt. 160., cited by Lawrence J. from M.S.

(3) *Davison v. Gill*, 1 East, 64.

(4) *Taylor v. Cole*, 3 T. R. 296,

The defendant, therefore, cannot plead to the new assignment, that the place, mentioned therein, is the same with that in the plea; but, if in truth they are the same, the defendant should plead not guilty (1); and if at the trial the places appear from the evidence to be the same, the defendant will of course be entitled to a verdict on the issue upon the new assignment. (2)

If the declaration contain two counts, and the defendant plead not guilty to both counts, and as to the trespass in the first count justifies under mesne process, and to this the plaintiff new assigns, here he waves the arrest under the writ, and has precluded himself from giving evidence of that at the trial. (3) "If," said Mr. Justice Buller in this case, "there were in fact two imprisonments, and the plaintiff had not new assigned, as he has done here, he might have given evidence of both at the trial; but there being only two imprisonments in fact, and one of them being abandoned on the record, the plaintiff could not have recourse to the second count: for he cannot avail himself of one and the same act of imprisonment both on the new assignment and on the second count.

In support of a new assignment, the plaintiff ought to prove a trespass, which is not covered by the plea. Thus, in trespass for breaking down and carrying away a gate, if the defendant plead a right of way over the place, and, because the gate was erected across the way, that he broke it down, and carried it to a convenient distance, and laid it near for the use of the plaintiff, to which the plaintiff replies, (protesting that defendant did not remove to a convenient distance, &c.) that the defendant afterwards converted it to his own use; the mere fact of the defendant having laid down the gate on his own premises, will not support the new assignment, which charges a subse-

(1) See 1 Saund. 299. c., Greene v. Jones, in note.

(2) Pratt v. Groome, 15 East, 235.

(3) Atkinson v. Matteson, 2 T. R. 176.

quent conversion; for he has admitted that the depositing on the gate there was for his (the plaintiff's) use. (1)

In an action of trespass for breaking and entering the plaintiff's house, staying there three weeks, and seizing and carrying away his goods, the defendant pleaded, first, not guilty to the whole, and, secondly, as to breaking and entering the house, and staying there twenty-four hours, part of the said time in the declaration mentioned, and also as to the seizing and carrying away the goods, pleaded a justification under a writ of *feri facias*; and the plaintiff replied to the last plea, admitting the writ, *de injuriâ sua absque residuo causæ*; Lord Ellenborough held, that the last plea applied to the whole of the declaration, and that, if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment; as the pleadings now stand, the residue of the cause, mentioned in the plea, is alone put in issue, and the length of time, during which the officers staid in the house, is rendered immaterial. (2)

If a declaration in trespass contain two counts, and the defendant plead to one, and suffer judgment by default on the other, and on the trial of the issue on the first count the plaintiff only prove one act of trespass, which is covered by the second count, he will not be entitled to a verdict on the first count. (3)

## SECT. II.

### *Of Evidence in an Action for Trespass to the Person.*

MANY of the rules, which have been mentioned with reference to the action of trespass for an injury to property, will

(1) *Houghton v. Butler*, 4 T. R. N. P. C. 176. And see *Warrall v. Clare*, 2 Campb. 629.

(2) *Monprivatt v. Smith*, 2 Campb. (3) *Compere v. Hicks*, 7 T. R. 727.

apply equally to this kind of action; and they need not be repeated in this place.

**One count—  
one assault.**

If the declaration contain but one count, the plaintiff, after giving evidence of one assault, cannot wave that, and proceed to offer evidence of another (1); a different rule might be extremely inconvenient. The proof of a trespass at any time before the commencement of the action, will be sufficient.

**Place.**

The plaintiff may prove the assault in any place, either within or out of the county, where the cause is tried; except in particular cases, under the provisions of special acts of parliament.

**Assault felonious.**

If the nature of the assault appear, on the trial of the cause, to be of such an aggravated nature, that, in the opinion of the Court, the defendant might properly be tried for a felony, the plaintiff cannot maintain this action, without proof that the defendant has been tried on a criminal prosecution. The civil remedy is suspended, until the justice of the country is satisfied in respect to the public offence. But when this has been accomplished, the party will be entitled to his action, whether the trial of the offence end in a conviction or in an acquittal. (2) The record of conviction, or of acquittal, is conclusive evidence, that there has been a trial of the prisoner for the specific offence; but, on the production of the record of acquittal, the defendant may prove, if he can, that the acquittal was by collusion of the plaintiff. (2)

**Conviction,  
when evi-  
dence.**

A conviction for an assault before a magistrate, on the information of the injured party, is not evidence on an action for the same assault. (3) And it is laid down by Mr. Justice Buller, that the plaintiff cannot give in evidence a conviction at the suit of the King for the same battery; for it is a general

(1) *Stante v. Prickett*, 1 Campb. 473.

(3) *Smith v. Rummena*, 1 Campb. N. P. C. 9. See vol. 1. p. 337.

(2) *Crosby v. Leng*, 12 East, 412. 410.



rule, he says, that no record of conviction or verdict shall be given in evidence, but such whereof the benefit may be mutual; namely, such whereof the defendant, as well as the plaintiff, might have made use, and given in evidence, in case it had made for him. (1) But if a person, indicted for an assault, plead guilty to the charge, the record has been considered to be conclusive against him in an action for damages for the same assault. (2)

Where an action is brought against several for a joint trespass, and the plaintiff gives evidence of a trespass committed at a particular time, he must confine himself to that period; and if all the defendants were not concerned in that trespass, the plaintiff cannot have recourse to a trespass committed at another time, for the purpose of implicating some of the defendants, who had not been implicated in the first transaction; otherwise, they might be subjected to damages for a trespass, in which they had no concern. (3)

Action against several.

With respect to the proof of special damages under the general averment, (that the defendant did other wrongs to the plaintiff,) Lord Kenyon, in the case of *Lowden v. Goodrick* (4), said, it had been often determined, that nothing can be given in evidence under this general averment, except acts which could not be put on the record; as, in actions for criminal conversation and the like, things which could not with decency be put upon the record, might yet be proved; and in the case cited, therefore, which was an action for trespass and false imprisonment, he refused to admit evidence, that the plaintiff had been stinted in food during the confinement.

Averment of other wrongs.

In trespass for assault and battery, or *quare clausum fregit*, where the declaration charges, that the defendant, on a certain

(1) Bull. N. P. 16.

(2) See vol. i. p. 337.

(3) *Sedley v. Sutherland and others*, 3 Esp. N. P. C. 203.

(4) *Peake*, N. P. C. 46. See ante, p. 189.

day, and on divers other days between that day and the commencement of the suit, assaulted, &c., the plaintiff may prove any number of trespasses within those limits; or he may prove a trespass beyond the remotest day, waving all the rest. (1) And even after proving several assaults within the days mentioned in the declaration, perhaps he would be allowed to give evidence of assaults committed before that time, as proof of the defendant's malice.

**General issue.** The general issue denies the fact of the trespass; and whatever is matter of justification ought to be pleaded. Under this issue, the defendant may shew, if he can, that the act, complained of, was done without any default on his part. Thus in the case of *Gibbons v. Pepper* (2), the Court admitted, that the defendant might have proved, under the general issue, the justification there pleaded, which was, that he was riding on a highway, and his horse, being frightened, ran away with him, and he called to the persons standing near, among whom was the plaintiff, desiring them to go out of the way, but that the plaintiff did not go out of the way, and so was run over.

The officers and persons in public employments, mentioned in the st. 21 J. 1. c. 12. s. 5. st. 42 G. 3. c. 85. s. 6., st. 23 G. 3. c. 70. s. 30., st. 24 G. 3. c. 47. s. 35., may give in evidence the special matter under the general issue: so may other persons acting in their aid, or by their command, concerning their office.

**Plaintiff's first assault.** The most common defence is, that the plaintiff made the first assault, and this must be specially pleaded. (3) Under this plea, if the defendant prove that the plaintiff first lifted up his stick, and offered to strike him (4), or that he laid his hand on his sword (5), it is a sufficient assault to justify his

(1) Bull. N. P. 86.

(2) 1 Ld. Raym. 38. 2 Salk. 637.  
A justification was there held to be bad, because it did not confess the trespass. And see Bull. N. P. 17.

(3) Co. Litt. 282. b. 283.

(4) Bull. N. P. 18.

(5) Gilb. Ev. 219.

striking the plaintiff: and he need not wait till the plaintiff has actually struck him. It is not every assault, that will justify a battery; but whether the assault was, or was not, proportioned to the battery (1), is a question to be determined upon the evidence.

If the defendant plead a first assault by the plaintiff, and the plaintiff can justify it, he ought to plead the justification; he cannot give it in evidence under the general replication *de injuriâ suâ*. (2) If the parties join issue on this general replication, the defendant may give evidence of any other assault, besides that on the day assigned by the plaintiff, and upon such evidence, says Rolle C. J. in his Abridgment, "it seems, that a verdict ought to be found for the defendant; for the day is not material, and on such a special justification the defendant is allowed to prove his plea at another time; the plaintiff might have made a new assignment, and then he might have had his election to prove any assault upon him at any time, for perhaps there may be several trespasses at several times, for which the defendant may have several answers; and if such a manner of pleading and such evidence were not allowed, the defendant would not know how to help himself, nor would he know for what trespass the action is brought." (3) If the plaintiff had made a new assignment, he might then give in evidence a battery at any other day, as he might, if the defendant had pleaded not guilty to the declaration; but as the common way is for the plaintiff to have two or three counts in his declaration, so that the defendant is under a necessity of pleading the general issue to some of them, (for, if he justify two, he admits two, and consequently, unless he can prove two justifications, must have a verdict against him,) he may prove another battery without being put to make a new assignment. (4)

(1) Bull. N. P. 18.

(2) Bull. N. P. 18. King v. Phippard, Carth. 380.

(3) Roll. Ab. tit. Trial, (C). pl. 3. He cites a case, where the contrary was

held; but adds, that Jones J. doubted, and wished to have it found specially.

(4) Bull. N. P. 17. Smith v. Milles, 1 T. R. 479.

## SECT. III.

*Of Evidence in an Action for Adultery, and in an Action for debauching the Plaintiff's Daughter.*

THE action for adultery, and that for debauching a daughter, have in some points of view been considered as actions on the case, but for general purposes, in conformity with the most approved ancient forms and the most recent decisions, they are to be classed as actions of trespass. (1)

I. First, of the action for a criminal conversation with the plaintiff's wife.

Proof of  
marriage.

In this action, evidence of an actual marriage between the parties will be necessary; the cohabitation of the parties as man and wife, the reputation of an existing marriage, or the plaintiff's acknowledgment of the woman as his wife, are not sufficient to maintain the suit. (2) A different rule, as Lord Mansfield observed in the case of *Morris v. Miller* (2), would be subject to this inconvenience, that it might render persons liable to such actions, upon the evidence made by the very parties who bring the action. And in the case of *Birt v. Barlow* (3), where the subject was much considered, Lord Mansfield observed, "that this is the only civil case, where it is necessary to prove an actual marriage. In other cases cohabitation and reputation are equally sufficient. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes, by bad persons giving the name and character of wife to women, to whom they are not married, in such an action a marriage in fact must be proved."

(1) *Woodward v. Walton*, 2 New Rep. 476. *Ditcham v. Bond*, 2 Maule & Selw. 436.

(2) *Morris v. Miller*, 4 Burr. 2057. *Birt v. Barlow*, 1 Doug. 170.

(3) Doug. 170.

If the register is not produced, but the marriage is proved, Registers. as it may be, by a witness who attended at the ceremony, without the corroborating evidence of the register, it does not appear necessary to prove in addition the publication of banns, or a licence of marriage; for though the marriage is absolutely void without one or the other of these sanctions, yet it seems not unreasonable to presume from the fact of the marriage, that the marriage has been duly solemnized, especially against the defendant a trespasser and wrong-doer, and as the solemnization of marriage, without either a licence or the publication of banns, is so highly penal.

An entry of marriage in the parish register, made in the form prescribed by the act of parliament, or an examined copy of such entry will be evidence of a marriage solemnized between the parties, who are there described. (1) Parish registers have this authority, as public books, preserved for the general use of the community, compiled by order of the legislature, and accompanied with all the surest means of authenticity. Other books recording marriages, such as the book of the Fleet-prison, or registers kept in the islands of Guernsey or Jersey, or those of foreign chapels, are not of the same character, nor entitled to the same degree of credit; and they are not legal evidence of a marriage. (2) And where the marriage has been solemnized in a public chapel in this country, Lord Ellenborough held in one case, that the plaintiff ought to be provided with the registers and other evidence, to show that the banns have been, and still are, usually published there; this proof was considered to be necessary, in order to raise the presumption, that the chapel was one, in which marriages had been lawfully solemnized, according to the provisions of the marriage act. (3)

The parish register is not the only legitimate proof of the fact of marriage, though in general it may be the most satis-

(1) See vol. i. p. 407.

(2) *Ib.* p. 408.

(3) *Taunton v. Wyborn*, 2 Campb. 297.

factory; one who has been present at the solemnity is as competent to speak to that fact, as the register itself; for there is no principle of evidence which makes the register indispensably necessary, as a higher species of proof; nor is there any provision of that kind in the marriage act, one great object of which was to facilitate and preserve, as much as possible, the evidence of marriages, not to limit or narrow the proofs; and the registration is not essential to the legality of a marriage. The same remark may be made on the testimony of the attesting witnesses in the marriage-entry, as compared with that of any other persons who attended the wedding; the evidence of the former is not of a higher order, nor is it to be resorted to as in any degree superior to the evidence of the other class of witnesses.

Proof of  
identity.

The entry in the marriage-register proves a marriage, but not that the parties married are the persons, whose marriage is in question. Some evidence of identity, therefore, will be necessary; and this may be proved in various different ways. It may be proved, for instance, by some person acquainted with the parties, who was present at the marriage. This is one mode; and such a witness is fully as competent as any of the persons who officiated at the ceremony; since it must constantly happen, that neither the minister, nor the clerk, nor any of the subscribing witnesses, have been since acquainted with the married couple, in which case they would not be able to prove the identity.

Another mode of proving the identity is by proof of the handwriting of the parties in the original register\*; and this also may be satisfactorily proved by persons acquainted with the parties and their handwriting, without the evidence of

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\* The expressions used by Mr. Justice Buller, in the report of the case of *Birt v. Barlow*, seem at first sight to imply, that if the original is produced, the subscribing witnesses are the proper persons to be called, to prove the handwriting. He is reported to have said, "the original register is not necessary to be produced; and it is only where that is required, that the subscribing witnesses must be called."

either of the subscribing witnesses named in the register. There appears to be no peculiar advantage, that would result from calling such a subscribing witness. The reason, why the evidence of a subscribing witness is indispensable in the case of a deed or other private document, will not in any degree apply to this subject, nor are the cases in the least analogous; for there the testimony of the subscribing witness is necessary as antecedent proof, and for the purpose of introducing the document in evidence; on the contrary, the register proves itself; it is directed to be kept as a public book, and is accompanied with every means of authenticity; it may be considered in the nature of a record, and need not be produced, nor proved by subscribing witnesses. (1) And if a subscribing witness were called, what in ordinary cases would he be able to prove? Perhaps, he may never have seen either of the parties at any other time except at the marriage; or, perhaps, he may never have seen any other specimen of their handwriting, besides their signature in the register; so that, in truth, for the purpose of proving the handwriting, and to establish the identity of the parties, a subscribing witness may be one of the most ill-informed and useless witnesses, that can be produced.

In addition to these proofs, there are several other modes of ascertaining the identity of the parties. Suppose, as Lord Mansfield said in the case of *Birt v. Barlow*, the bell-ringers were called, and were to prove that they rung the bells, and came immediately after the marriage, and were paid by the parties; or suppose persons called, who were present at the wedding-dinner, and there saw the parties treated as the married couple; or suppose it were proved, that the person, whose maiden name is mentioned in the register, always bore that name till the day of marriage, but on that day and ever since has borne the plaintiff's name; all these, and many others that might be mentioned, are distinct marks of identity.

(1) 1 Doug. 174. by Lord Mansfield.

Defendant's  
acknowledg-  
ment of plain-  
tiff's marriage.

We have before seen, that the reputation of marriage, and cohabitation of the parties as man and wife, are not sufficient evidence of the fact of marriage, to support this action. In the case of *Morris v. Miller* (1), therefore, where it was proved, that articles of settlement had been executed by the plaintiff and his wife, purporting to be made after the marriage with the privity of her relations; that she always bore the name of his wife, and was so considered by the relations on both sides; and that the parties cohabited as man and wife; this evidence was held to be insufficient. It appears further, from the report of this case, that there was some evidence of an acknowledgment by the defendant, of the adulteress being the plaintiff's wife; "the defendant having confessed to the landlord of the lodgings (to which he resorted after the elopement) that she was the wife of Captain Morris the plaintiff), and that he had committed adultery with her." This was stated to be the evidence on one side, and not questioned on the other. Upon this point, the plaintiff's counsel contended, that such a confession was better than the evidence of witnesses, and rendered strict proof of the fact of marriage unnecessary; and that a confession would be good evidence of the marriage on a prosecution for bigamy. Lord Mansfield, in delivering the judgment of the Court, has not taken any notice of this circumstance; excepting in one passage, in which he stated, (alluding probably to the argument which had been used,) that in prosecutions for bigamy a marriage in fact must be proved. Lord Mansfield, and the rest of the Court, appear to have considered this evidence, not as an unqualified and clear acknowledgment of the marriage, but rather as a mere admission, that the person in question was reputed to be the plaintiff's wife, and therefore that it could not dispense with the strict proof of an actual marriage. This appears from the statement of this part of the case by Mr. Justice Buller (2); who, after citing the case of *Morris v. Miller*, says, "so where the defendant was surprised at a lodging with the plaintiff's wife, and, on being asked where Major

(1) 4 Burr. 2057.

(2) Bull. N. P. 28.



Morris's wife was, he answered, "in the next room," this was holden not to be sufficient, for it is only a confession of the reputation, and that she went by the name of the defendant's wife, and not a confession of the fact of the marriage." The decision, therefore, in the case of *Morris v. Miller*, does not warrant the conclusion, that a distinct and full acknowledgment of the marriage, made by the defendant himself, will not be evidence of the fact as against him, and sufficient to dispense with the more formal and strict proof of marriage; but, on the contrary, an opposite inference may properly be collected from the statement of Mr. Justice Buller, namely, that such an acknowledgment is good evidence of the fact of marriage against the party acknowledging. And a variety of instances might be mentioned, in which the strict and regular proof of a fact has been considered unnecessary, when the party, against whom it would otherwise be requisite to prove the particular fact, has himself admitted it to be true. (1) Even in the case of a prosecution for bigamy, with which the action for adultery has often been compared in one respect, as requiring the same strictness of proof, the judges have held, that the prisoner's acknowledgment of the first marriage is admissible as evidence of that fact. (2) In this latter case, it is true, the confession relates to a fact, which must necessarily be within the prisoner's knowledge; whereas in the other case, it may be said, the defendant might have spoken vaguely and without any means of information. Still, however, upon the general principles of evidence, an acknowledgment of the fact of marriage seems admissible, as proof of that fact against the defendant; though, perhaps, in some cases, it may be entitled to a slight degree of weight, and it would

(1) See *Maltby v. Christie*, 1 Esp. N. P. C. 340., cited by Lord Ellenborough in 16 East, 193. *Dickinson v. Coward*, 1 Barn. & Ald. 677. and other cases cited in vol. i. p. 106. 226.

(2) *Truman's case*, 1 East, P. C. 470. *Russell*, vol. i. p. 300. S. C. In this case there was also produced a copy of a proceeding against the man and woman in a Scotch Court,

for having contracted marriage illegally. Two of the judges thought, that the prisoner's acknowledgment did not rest singly by itself, but was backed by the copy of the proceedings. But some of the Judges thought, that the acknowledgment alone would have been sufficient, and that the paper produced was only a confirmation of the acknowledgment.

certainly be highly imprudent and perilous for the plaintiff to rest upon such proof, when more satisfactory evidence can generally be supplied.

**Proof of adultery.**

With respect to the proof of the act of adultery, it is enough to say, that whatever convinces the jury of the consummation of the act, will be sufficient for this purpose. Any number of adulterous acts may be proved within the limits of the time specified in the declaration; and in addition to this, with a view of explaining the nature of the intimacy between the parties, indecent familiarities may be proved, even earlier than the first-mentioned day, though not a previous criminal connection. (1)

**Letters.**

The wife's letters to the defendant, in general, are not evidence for him against the plaintiff (2); under certain circumstances, however, they may be admitted; as, for instance, in mitigation of damages, with a view of showing, that the wife was the seducer, and made the first advances of a criminal nature to the defendant. (3) And, in general, the wife's letters to the husband are not evidence for him against the defendant. Yet to this rule, also, there are exceptions; as, where the letters have been written by her during an absence from her husband, and are offered as evidence of her disposition towards him. (4) Conversations between her and the defendant are of course evidence against the defendant, in the same manner as the defendant's letters to the wife, or proof of any other transaction, in which he bears a part.

**Mutual conduct of husband and wife.**

The state of feeling and the degree of mutual affection between the parties, before their acquaintance with the defendant, are to be proved by those who have been in habits of intimacy with the family. It is the general tenor of their feeling, and the prevailing habit of their daily intercourse, which best show a state of happiness. If they have lived for some time

(1) *Duke of Norfolk v. Germaine*, 8 State Trials. 6.

(2) See vol. i. p. 81.

(3) *Elsam v. Fawcett*, 2 Esp. N. P. C. 562.

(4) See post, p. 209.

necessarily separate, (as in one case (1), where they were servants in different families,) or if there has been only a temporary absence (2), the letters of the wife to the husband, written during the separation and before any suspicion of her misconduct, are admissible, as showing her conduct and demeanour to the husband. "What the husband and wife say to each other is, beyond all question, evidence to show their demeanour and conduct, whether they were living on better or worse terms; what they write to each other may be liable to suspicion, but, when that is cleared up, the ground of the objection fails." (3)

As the plaintiff is bound to prove an actual marriage, so it will be open to the defendant to prove, if he can, the marriage invalid and void. Thus, where the marriage in question has been solemnized in a public chapel, proof is admissible, on the part of the defendant, that banns had not been usually published in the chapel, before the passing of the marriage-act (4); in which case, by the provisions of that act, the marriage is declared to be void to all intents and purposes.

Evidence for  
the defendant.

If it can be shown, that the plaintiff consented to the adulterous intercourse (5); or that he suffered her to live in a state of prostitution, by which the defendant was drawn into the criminal connection (6); the plaintiff cannot in such a case maintain this action. If such a man were allowed to recover a verdict, said Lord Kenyon, the very source and first principles of justice would be contaminated. (7)

(1) *Edwards v. Crock*, 4 Esp. N. P. C. 39.

(2) *Trelawney v. Coleman*, 2 Starkie, N. P. C. 191. 1 Barn. & Ald. 90. S. C.

(3) By Lord Ellenborough C. J. 1 Barn. & Ald. 90.

(4) *Taunton v. Wyborn*, 2 Campb. 297.

(5) *Duberley v. Gunning*, 4 T. R. 651. 1 Selw. N. P. 11 n. (4).

(6) *Bull. N. P.* 27. 1 Selw. N. P. 11.

(7) In the case of *Duberley v. Gunning*, 4 T. R. 655

Circumstances  
in extenu-  
ation.

The circumstances in extenuation, to lower the amount of damages, will vary with every varying case. Proof of the wife's tainted character, as, that she had before been a prostitute, or eloped with another (1); or proof of her being a woman of notoriously bad character, and that she made the first advances of a criminal nature to the defendant (2); or proof of the husband's profligate habits, and his criminal connection with other women (3); or that he felt no affection for his wife, turning her out of his house and refusing to maintain her, before the intercourse with the defendant (4); or that he connived at the indecent familiarities of the defendant (5), and shewed the utmost indifference about her reputation and character; these are some of the many circumstances, which manifestly ought to have a very considerable effect with the jury in reducing the amount of damages.

One defence, as we have seen, is, that the plaintiff connived at his wife's elopement. In such a case proof may be admitted, on the part of the plaintiff, of the wife's declaration as to her intention and purpose in leaving his house; for the question in effect is, whether the husband knew that she was about to elope, or whether he believed that her intention was as she represented. (6)

If the wife's character for chastity has been attacked, whether by the testimony of witnesses called on the part of the defendant, or by the course adopted in the cross-examination of the plaintiff's witnesses, evidence in support of her character will be properly admitted, either in chief or in reply. Even

(1) Bull. N. P. 27. 296.

(2) *Elsam v. Fawcett*, 2 Esp. N. P. C. 562. *Coote v. Berts*, 12 Mod. 252. *Gardiner v. Jadis*, MS. case, 1 Selw. N. P. 25.

(3) Bull. N. P. 27. *Bromley v.*

*Wallace*, 4 Esp. N. P. C. 237.

4 T. R. 658.

(4) Bull. N. P. 27.

(5) Bull. N. P. 27. 4 T. R. 655.

658.

(6) *Hoare v. Allen*, 5 Esp. N. P. C. 276.

though the cross-examination may have failed in its object, yet perhaps the plaintiff might be properly allowed, in the progress of his case, to produce some evidence in favour of her character; for an imputation, once thrown out, is too apt to excite suspicion even in the fairest minds: and, unless at least the imputation is retracted in the most unqualified terms, so as to leave not a trace behind, the evidence of character appears to be made necessary by the course, which the other party has adopted in the defence. However, it seems that Lord Kenyon doubted of the propriety of admitting such evidence, in a case where some imputation had been unsuccessfully made on the character of the plaintiff. (1) Lord Kenyon is reported to have said, in that case, "although the cross-examination of the plaintiff's witnesses had been directed to impeach the character and conduct of the plaintiff, he did not think that this authorised him to break through the rule of evidence, by going into proof of character, as that character stood unimpeached by the testimony of the witnesses examined, who had denied the imputation intended to be conveyed."

II. Secondly, of the action for assaulting and debauching the plaintiff's daughter.

II. Action for debauching the plaintiff's daughter.

This action is considered to be an action of trespass, although the real foundation of the action is not violence, but the loss of service, which the plaintiff is supposed to have sustained in consequence of the seduction. \* (2) This is the only legal foundation for the action; but beyond such a loss, which in most cases is merely imaginary, the plaintiff will be

(1) *King v. Francis*, 3 Esp. 116.

(2) *Woodward v. Walton*, 2 New Rep. 476.

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\* The action may be maintained by one who has adopted an orphan as his own child (*Irwin v. Dearman*, 11 East, 23.); or by one standing in the place of a parent, (as, an aunt,) even during the parent's life. *Edmondson v. Machell*, 2 T. R. 4.; and see 11 East, 24.

allowed to recover damages, aggravated by the injury done to the object of his affection. However difficult it may be, said Lord Ellenborough, in one of the cases on this subject (1), to reconcile to principle the giving of greater damages on such a ground, the practice is become inveterate, and cannot now be shaken.

Loss of  
service.

The relation of master and servant must subsist, at least in some degree, but a very slight degree will be sufficient. (2) Proof of the most trifling acts of service, (such as the milking of cows (3), or making tea for the plaintiff,) will enable the plaintiff to maintain this action of trespass for assaulting and debauching his daughter. The daughter's attendance on the parent in sickness is another act, which may be considered an act of service, and amply sufficient for the purposes of such an action. Indeed, if the slightest act of service were not sufficient, the action would necessarily be confined to the lower ranks of life, in which the daughter is literally a servant; and could never be extended to the higher order, where it is generally more wanted, and where the injury is often of a more aggravated kind. However, some evidence of this kind, slight as it may be, will be absolutely necessary; and it seems to be equally necessary, whether the daughter is of full age or under age. (4) \*

(1) 11 East, 24. And see *Fores v. Wilson, Peake, N. P. C. 54.* (2) *Postlethwaite v. Parkes, 3 Burr. 1878. 2 T. R. 167.*  
*Tulidge v. Wade, 3 Wills. 19.* (3) *Bennett v. Allcott, 2 T. R. 168.*  
 cases in MS. cited in 2 Selw. N. P. 1001. (4) *Dean v. Peel, 5 East, 45.*

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\* In the case of *Dean v. Peel*, above cited, which was an action on the case for debauching the plaintiff's daughter, it appeared that the daughter, who was under age, was at the time of the seduction not living with her father, but was in service in another person's family, and had no intention of returning to her father's house; so that this case does not expressly determine, whether some proof of actual service is necessary, where the daughter, under the age of twenty-one years, is living with the father and under his protection. In the case of *Jones v. Brown* (*Peake's N. P. C. 233.*), which was an action for an assault upon the plaintiff's son and servant, Lord Kenyon declared, as the plaintiff's counsel were proceeding to prove

A different rule, with respect to the necessity of proving acts of service, has been adopted in the action of trespass for breaking and entering the plaintiff's house, and debauching his daughter. In the case of *Cock v. Wortham* (1), the Court of King's Bench determined, that where the loss of service is the foundation of the action, as in trespass *for assaulting the servant*, there the loss of service must be proved; but where it is laid only in aggravation of damages, as in an action for breaking and entering the plaintiff's house, there, although the loss of service is not proved, (and consequently no damages for the seduction can be given,) yet the plaintiff will be entitled to a verdict for the trespass.

In the action of trespass for entering the plaintiff's house, and debauching his daughter, the defendant cannot prove, under the general issue, a licence from the plaintiff, or his permission to enter. (2) And if a licence were pleaded, the fact of the daughter having admitted the defendant into the house, if done without the privity of the father or mother, would not sustain the plea. (3)

The daughter is clearly a competent witness to prove the seduction and other facts of the case; and it is the constant practice to admit her evidence. On her cross-examination, she is not compellable to answer the question, whether she has been connected with other men. (4)

(1) 2 Str. 1054., more fully reported from MS. in 1 Selw. N. P. 999. (3) See *Cock v. Wortham*, 2 Selw. N. P. 999.

(2) *Bennett v. Allcott*, 2 T. R. 166.

(4) *Dodd v. Norris*, 3 Campb. 519.

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that the son, a boy about fourteen or fifteen years of age, was usually employed about his father's business, that such evidence was unnecessary; and that if the son lived in his father's family, and under his protection, this would be sufficient to maintain the action. And in the case of *Bennett v. Allcott* (2 Term Rep. 168.), where the daughter was considerably above twenty-one years of age, Mr. Justice Buller said, "Here, instances of actual service were proved, and therefore it is immaterial whether she were of age or not."

**Proof of  
promise of  
marriage not  
admissible.**

Evidence of the defendant having given the daughter a promise of marriage, before he seduced her, is not admissible. (1) The breach of such an engagement may be made the subject of another distinct action; and it is an injury to the daughter, not to the parent. In the case of *Dodd v. Norris* (2), where the cross-examination of the daughter was intended to show, that she had surrendered herself to the defendant with extreme indelicacy, and had been guilty of levity of conduct, it was insisted, that a promise of marriage might be proved, for the purpose of explaining under what circumstances, and with what prospects, she had admitted the familiarity of the defendant: but Lord Ellenborough refused to admit the evidence, and ruled, that the utmost limit to which the re-examination could properly go, would be to enquire, whether he paid his addresses to her in an honourable way.

**Evidence of  
character.**

Witnesses cannot be examined, on the part of the plaintiff, as to the general character of the daughter on the point of modesty, except in answer to evidence on the other side; and even if a specific breach of chastity were to be proved by the defendant's witnesses, (as that she had a criminal connection with another person before her acquaintance with the defendant,) still it has been held by Lord Ellenborough, in the case of *Bamfield v. Massey* (3), that such evidence of general character is not admissible, and that the plaintiff ought to be restricted to the disproving of the specific breach of chastity alleged by the defendant. In another case (4), where the daughter had been cross-examined as to the supposed indelicacy and groseness of her conduct, and it was proposed to call witnesses to speak to her general character, with a view of repelling the imputations upon her modesty, Lord Ellenborough ruled, that such evidence could not be received, as no evidence of her bad character had been given on the part

(1) *Tullidge v. Wade*, 5 Wils. 18.

(3) 1 Campb. 460.

(2) *Dodd v. Norris*, 3 Campb. 519.

(4) *Dodd v. Norris*, 3 Campb. 520.  
*Elliott v. Nicklin*, 5 Price, 641.



of the defendant; and that the proper time for explaining her conduct was on the re-examination. (1)

The plaintiff, as was before stated, may recover damages. Damages. beyond the loss of service. Indeed, the loss of service is in most cases merely imaginary; the real injury is the wound to the parents' feelings. The highest legal authorities have declared, that damages may be properly given as a compensation for the loss, which the father has sustained, in being deprived of the society and comfort of his child, and from the dishonour which he receives. (2) An enquiry, therefore, into the circumstances of the father's family, the general good conduct of the family, and the number of his children, has been properly allowed. In a case (3), where such evidence was proposed and objected to, Lord Eldon received the evidence: he said, "In point of form, the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact, that this is an action brought by a parent for an injury to his child: in such a case, I am of opinion, the jury may take into their consideration all that he can feel from the nature of the loss. They may look upon him as a parent losing the comfort as well as the service of his daughter, in whose virtue he can feel no consolation, and as the parent of other children, whose morals may be corrupted by her example."

(1) See ante, p. 211.

(2) So held by Lord Ellenborough in the case of *Southernwood v. Ramsden*, MS case, reported in

2 Selw. N. P. 1001., and by Lord Eldon in *Chambers v. Irwin*, ib.

(3) *Bedford v. McKowl*, 3 Esp. N. P. C. 119.

## CHAP. XIV.

*Of Evidence in Actions given by Statutes.*

THE preceding chapters having treated of that class of actions on the case, which are founded on contracts and on torts, it is proposed now to consider another class, which has been given by particular acts of parliament. It is not intended to go in detail through the long list of actions of this kind, but to limit the enquiry to such as are in most frequent use; of which the action on the statute of Winton, and that on the Riot Act, are the principal.

I. Action on  
stat. of hue  
and cry.

I. First, as to the action given by the statute of Winton, or, as it is commonly called, the Statute of Hue and Cry.

The statute of Winton (1) makes the inhabitants of hundreds answerable for robberies, if they have not taken the offenders within a certain time after the offence. The declaration in this action usually states the robbery of the plaintiff, and specifies the property stolen; it then states the raising of the hue and cry, the notice of the robbery to the inhabitants of some town or hamlet near the place, the examination of the party on oath before a magistrate, the notice to one of the constables of the hundred, the notice in the Gazette, and the bond for payment of costs in case the plaintiff fail in his action; and states, lastly, that forty days have elapsed since the robbery, yet that the inhabitants of the hundred have neither made amends, nor apprehended any one of the offenders.

Proof of  
robbery.

First, as to the robbery.—It must be proved, that the plaintiff has been robbed in the day-time, or day-light, and

(1) St. 13 Ed. 1. c. 2.

out of the night (1), that is, while there was sufficient light (whether before sun-rise or after sun-set is immaterial,) to distinguish a man's countenance; that he was robbed openly, as on the highway, or in a lane or wood, or some other open place (2), and not in a dwelling-house, which a man is expected to defend at his own peril (3); that he was robbed in the hundred named in the declaration, but whether in the same parish, (if a parish is named,) or in some other parish, is not material (4); and, if robbed on a Sunday, that he was not travelling at the time: the statute in the reign of Ch. 2., for the better observance of that day (5), having expressly enacted, that "if any person, who shall travel on the Lord's day, shall be then robbed, the hundred shall not be answerable for the robbery so committed."

Secondly, as to the notice of the robbery, to be given by the plaintiff. — The hue and cry is to be made by the hundred; on receiving notice of the robbery, the inhabitants are bound to raise the hue and cry without delay; though the declaration, therefore, usually avers, that it was made by the plaintiff, that averment need not be proved. (6)

The notices, to be proved on the part of the plaintiff, are, first, that by the statute 27 Eliz. c. 13. s. 11., which requires notice and intelligence of the robbery to be given with all convenient speed to some of the inhabitants of some town, village, or hamlet, near the place where the robbery was committed. This statute, it may be observed, does not insist on a notice to the nearest place, nor on a notice to any place in the

1. Notice to  
Inhabitants.

(1) Ashpole's case, 7 Rep. 2d part, 6. a. Milborn's case, ib. 6. b. May v. Hundred of Morley, Cro. Jac. 106. Bull. N. P. 184.

(2) Cooper v. Hund. of Basingstoke, 2 Lord Raym. 828.. There the robbery was committed in a coppice. Proof that the robbery was committed in a private way, is sufficient to charge the hundred. Bull. N. P. 184. The declaration needs not state the robbery to have been com-

mitted in a highway. Savill's case, 1 Mod. 221. 2 Saund. 376. note 8. Such a statement seems therefore immaterial, and it would not be of any consequence, if the robbery were to be proved in some other place.

(3) Sendil's case, 7 Rep. 2d part, 6. a.

(4) Shrewsbury v. Hund. of Ash-ton, 2 Leon. 174.

(5) St. 29. C. 2. c. 7. s. 5.

(6) Bull. N. P. 187.

same county or hundred, in which the robbery was committed; and the cases have determined (1), that this is not the meaning of the legislature.

2. Notice to Constable.

The other additional notices, to be proved, are that to the constable and that in the Gazette, which are required by the stat. 8 G. 2. c. 16. In conformity with this statute, it ought to be proved, that the party robbed, with all convenient speed after the robbery, gave notice of it to one of the constables of the hundred, or to some constable, borsholder, headborough, or tithingman, of some town, parish, village, hamlet, or tithing, near the place where the robbery happened; or that he left notice in writing of the robbery at the dwelling-house of such constable, &c., describing in such notice, so given or left, (so far as the nature and circumstances of the case will admit,) the felon or felons and the time and place of the robbery.

3. Notice in Gazette.

The notice in the Gazette ought to be inserted within twenty days next after the robbery; and it must describe, like the former notice, (so far as the nature and circumstances of the case will admit,) the felon or felons and the time and place of the robbery; and mention one other particular, which the former notice does not require, namely, the goods or effects of which the party was robbed. Every distinguishing mark, observed by the party robbed, in the features or appearance of the robbers, ought to be carefully mentioned in these notices; for the omission of any one distinguishing mark, by which the plaintiff would have recognized him, will be fatal to the action. (2) The notice should also give a full and correct account of the property, of which the party was robbed, as far as circumstances will allow; and if, before the time of inserting the notice in the Gazette, he has ascertained

(1) *Noy, 52. Merrick v. Hund. of Rapegate, Cro. Car. 379. Bull. N.P. 185.*

(2) *Whitworth v. Hundred of Grimshoe, 2 Wils. 109.* The omission was in the Gazette, and the mark omitted was one in the face, by which the plaintiff, as he said, thought he could have known the robber from any other person.

that other articles had been taken from him besides those specified in the Gazette, which at first he did not remember, the omission of these will not only preclude him from recovering to the extent of those particular articles, but the better opinion seems to be, that it will prevent him also from recovering for any part of his property, even for that which he has correctly described. (1) The notice in the Gazette is to be proved by the production of the Gazette.

Another form, necessary to be observed and proved at the Examination. trial, is the examination before a justice of peace, in pursuance of the stat. 27 Eliz. c. 13. s. 11. \* The examination of the party is to be taken on oath, within twenty days before the bringing of the action, by some justice of the peace of the county, in which the robbery was committed, inhabiting within the hundred or near it; and the party robbed is to be examined to this point, whether he knows any of the persons, who committed the robbery; that, in case of his knowing any, he may enter into a recognizance to prosecute.

(1) The Court were equally divided, *Whitworth v. Hundred of Grimsboe*, in *Chandler v. Hundred of Sunning*, 2 Wils. 109. 2 Saund. 376. n. 5. *Barnes*, 458; Bull. N.P. 186. S.C.

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\* The words of the statute of Eliz. are, that "no person or persons, that shall be robbed, shall have any action, except he or they shall, within twenty days before action brought, be examined upon oath, whether he or they knew the parties that committed the robbery." The words of the st. 52 G. 3. c. 130., another statute which gives an action against the hundred, are not very different: they are as follows, "that no person or persons shall be enabled to recover, unless he, she, or they, give in his, her, or their examination upon oath, or the examination of his, her, or their servant, that had the care of the buildings," &c. Under this latter clause, it has been held, that, if the action is brought by persons, partners in trade, several of whom were present when the offence was committed, an examination given in by a single partner on behalf of himself and the others, in which he declares only his own want of knowledge, is not sufficient (a); perhaps it may not be necessary, in all cases, that all the partners should be examined; but if one claim for the others, he ought at least to negative their knowledge, to the best of his belief; and if all the partners possess the means of information, (as, if they were present at the time of the fact,) then, it seems, they ought all to declare, whether or not they knew the offenders. (a)

(a) *Nesham and others v. Armstrong*, 1 Barn. & Ald. 146. 151, 152.

The examination need not be taken by the justice, who lives nearest to the place where the robbery was committed; and though there may be many others living nearer, it is not material. (1) Nor need the examination be taken within the county. (2) All that the statute directs, is, that the justice must be a justice of the county, and one who inhabits in the hundred or near it.

Proof of  
examination.

The examination, if taken in writing, must be produced, and proved as other examinations before magistrates. The common proof is by proving the handwriting of the magistrate, before whom the examination purports to have been taken. Proof that the person, who took the examination, acts as a justice of the peace, and that the examination was delivered by his clerk to the witness who produces it, has been thought sufficient. (3) The signature of the party robbed is not necessary; and if he signs, it seems unnecessary to prove his signature.

It is the duty of the magistrate to take the examination correctly: and when once taken in writing, it cannot be enlarged or varied by parol evidence. Nor is evidence admissible to show, that the party mentioned other circumstances before the magistrate, omitted in the examination, which are inconsistent with his account at the trial. (4)

A written examination, however, is not required by the statute; and though writing is generally most satisfactory, yet it is not absolutely necessary. If the examination has not been taken in writing, it may be proved by the magistrate, appearing at the trial, and deposing to the substance of the usual affidavit. (5)

(1) Bull. N.P. 186., citing *Lake v. Hund.* of Croydon, in 1774.

(2) This point was much considered in *Helier v. Hund.* of Benhurst, Cro. Car. 211., and so determined by nearly all the Judges of Westminster Hall.

(3) Bull. N.P. 186. citing a case before Parker Ch. J. in 1792.

(4) Bull. N.P. 186. And see *R. v. Thornton*, Vol. I. p. 372.

(5) Bull. N.P. p. 186.

Lastly, this examination ought to be taken within twenty days next before the action is brought. This is a condition precedent, and a limitation of the action. There is another limitation also, with reference to the time of the robbery; the stat. of Eliz. (27 Eliz. c. 13. s. 9.) having enacted, that the party robbed shall not charge the hundred, unless he commences his action within one year next after the robbery. To prove that the action has not been commenced too late, the original writ, which is the commencement of this action, ought to be produced, or, if returned and filed of record, proved by an examined copy. Original writs against hundreds, corporations, heirs, and in several other cases, are, by the practice of the Cursitor's Office, tested on the same day on which they are bespoken; and if the original against the hundred is tested within the year, the time is saved, though the writ has not passed the great seal till after the end of the year. (1)

Another form, and the only one which remains to be mentioned, is the giving of a bond, as security for costs. The stat. 8 G. 2. c. 16. s. 1. enacts, that no person shall maintain this action against the hundred, unless, before commencing the action, he shall go before the chief clerk or secretary, or the filacer of the county wherein the robbery has happened, or the clerk of the pleas of that court wherein the action is intended to be brought, or their respective deputies, or before the sheriff of the county where the robbery happened, and enter into a bond to the high constable of the hundred, in the penal sum of 100*l.*, with two sufficient sureties to be approved of by such chief clerk, &c. respectively, with condition for securing to such high constable the due payment of his costs, in case he (the plaintiff in the action) shall happen to be nonsuited, or shall discontinue his action, or in case of judgment against him on demurrer, or in case of a verdict given against him. The bond, therefore, conformable with this provision of the statute, must be produced, and the execution proved in the regular manner.

(1) *Price v. Hund. of Chewton*, 1 P. Will. 437.

**Witness.**

The party who has been robbed, though interested as plaintiff in the action, is yet a competent witness, from the necessity of the case, to prove the robbery, and the property of which he was robbed. (1) But he is not competent to prove other facts, which can as well be proved by other witnesses; such as the situation of the place where the robbery was committed, the notice to the inhabitants in the neighbourhood, or any other fact of a similar nature. (1) And the party robbed cannot recover more than the value of two hundred pounds, unless he was in company with another person at the time of the robbery, who can attest the truth of his being robbed. (2)

The inhabitants of the hundred, in which the robbery happened, would have been formerly incompetent; but now they are rendered competent by a clause in the statute before-mentioned (3), and may give evidence on behalf of the hundred, as they might, if residing in some other place.

**Defence under  
general issue.**

The averment in the declaration, that the hundred have not made amends, or apprehended any one of the offenders, is a negative, which it will be incumbent upon the defendants, if they can, to prove in their defence. The hundred will not be chargeable, if any one of the robbers has been taken before the commencement of the action, though not taken within forty days after the robbery; the writ being, "that they have not hitherto taken them." (4) This defence may be proved under the general issue.

Further, the hundred will not be chargeable, if any one of the robbers has been apprehended within the space of forty days next after the public notice in the Gazette. (5) Such a defence, in the opinion of Mr. Justice Buller, must be pleaded,

(1) See Vol. I. p. 70.

(2) St. 22. G. 2. c. 24. The statute is ill-penned, but this seems to be the meaning.

(3) St. 8 G. 2. c. 16. s. 15. See Vol. I. p. 125.

(4) *Baskervil v. Hundred of Ag-bridge*, 1 Sid. 11. 2 Saund. 275. a. note.

(5) St. 8 G. 2. c. 16. s. 5.



and cannot be given in evidence under the general issue. (1)  
 However, it should seem, according to the modern practice,  
 this might be given in evidence under the general issue of  
*nil debet*. (2)

Secondly, as to the action given by the riot act.

II. Action on  
 riot act.

The riot act, (1 G. 1. st. 2. c. 5. s. 6.) makes the inhabitants of a hundred liable to pay damages, where certain buildings, specified in the act, have been demolished or pulled down, either wholly or in part, by riotous assemblies of people; and this action of damages is to be brought against two or more of the inhabitants. The stat. 57 G. 3. c. 19. s. 38. extends the same protection to every kind of building, and to fixtures, furniture, or goods therein; and gives a similar remedy, in case of damage done to such property by riotous assemblies.

The plaintiff in this action will have to show an interest in the property, sufficient to enable him to sue for damages; as, for instance, his possession of the premises; or that he is the owner, or trustee having the legal estate: and it seems also, that the bare trustee of a mortgage-term, which has been satisfied, may maintain this action. (3)

Plaintiff's interest in the premises.

It will not be necessary to prove, that there were rioters, to the number of twelve, concerned in the work; for that number is not mentioned in the clause, which makes the offenders guilty of felony, nor in the clause, which gives the action against the hundred, though it is in a former clause of the statute. (4) However, it must be proved, that the outrage committed was of such a nature, as to amount to a felony within the meaning of the fourth section; in that case alone the hundred being liable. (5)

Nature of outrage.

(1) Bull. N. P. 187.

(2) See Vol. I. p. 318.

(3) Pritchit v. Waldron, 5 T. R. 14.

(4) S. C. 5 T. R. 14.

(5) Reid v. Clarke, 7 T. R. 496.

Commence-  
ment of ac-  
tion.

Prosecutions, under the riot act, are to be commenced within twelve months after the offence. (1) But there is no clause limiting the time for bringing the action; a provision generally adopted, where the hundred is made liable. However, it has been suggested (2), and it seems reasonable, that the clause respecting prosecutions would probably be held to apply also to the civil remedy.

Damages.

The measure of the damages, to be recovered, is the value of any part of the buildings, which may have been damaged or pulled down, or of the furniture or other valuable property destroyed or damaged in the prosecution of the riot. (3) But the value of property, which may have been feloniously taken away from the house, and stolen, cannot be recovered. (4)

(1) Sect. 7.

(2) 2 Saund. 378. b. note by Mr. Serjeant Williams.

(3) Ratcliffe v. Eden, Cowp. 485.

(4) Greasley v. Higginbottom,

1 East, 636. Beckwith v. Wood, 1 Barn. & Ald. 487.

## CHAP. XV.

### *Of Evidence in an Action of Ejectment.*

THE proceedings in the action of ejectment have been instituted for the purpose of trying this question: — which of the litigating parties is entitled to the possession of an estate, the party claiming possession, or the person who is supposed to withhold possession unlawfully. The lessor of the plaintiff must, therefore, prove the defendant, or, if the defendant defend as landlord, must prove his tenant in possession of the premises which he seeks to recover; and, further, must show in himself a legal title to the possession at the time, when he is supposed to have made the demise, stated in the declaration. A few general observations may be made upon each of these points, before the particular cases of ejectment come to be considered.

Plaintiffs have been, of late years, in many instances non-sued, from failing to prove at the trial the defendant's possession of the premises mentioned in the ejectment; but this being inconsistent with the true meaning of the consent-rule, by which the defendant is required to insist only upon his title, an order has been lately made by the Courts of King's Bench and Common Pleas, by which the defendant is required to specify in the consent-rule, for what premises he intends to defend, and to consent to confess upon the trial, that the defendant, (if he defends as tenant, or, in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises; and if upon the trial the defendant shall not confess such possession as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed. (1)

Defendant's  
possession.

The title proved must not be inconsistent with the demise laid in the declaration; in other words, the party, who is supposed to have demised the premises, must have had a legal power to demise. If the lease is a joint lease from several persons, it has been said, that they must be proved to be joint tenants; it certainly ought to be proved, at least, that they had such an interest, as would enable them to join in a demise of all the premises in question.\* Where, therefore,

Proof of title  
as laid.

(5) 4 Barn. & Ald. 196. 2 Brod. & Bing. 470.

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\* The plaintiff may declare on the several demise of each of the joint-tenants, as well as on the joint demise of all; for, by the several demises of each of the parties interested, he has the entire interest in the whole subject-matter, and the several letting severs the joint-tenancy. Doe dem. Marsack v. Read, 12 East, 57. Doe dem. Whayman v. Chaplin, 3 Taunt. 120. After the decision in the former of these cases, it may be a question, (as was suggested in that case by the Attorney-General, Sir Vicary Gibbs,) whether, since joint-tenants may sever, tenants in common may not join. The books lay it down as a clear established rule of law, that tenants in common may join in a lease for years (a), although such a lease will, in

(a) See Litt. sect. 316. Co. Litt. 45. a. 1 Roll. Ab. 377. (B) 4.

the plaintiff declared on a lease made by *A.* and *B.*, and it appeared at the trial that *A.* was tenant for life, and *B.* had the remainder in fee, so that they could not join in a present demise, the plaintiff failed; the Court resolved, in the words of the report, "that presently, by the delivery of the deed, it is the lease of *A.* during his life, and the confirmation of *B.*;" and, therefore, during *A.*'s life, the plaintiff ought to have declared on a lease made by him, and, after his death, on a lease made by *B.* (1) In support of a joint demise, it will be sufficient to prove a payment of one entire rent by the defendant to the common agent of the several lessors of the plaintiff. (2)

Proof of  
premises as  
described.

The locality of the premises must correspond with the description in the declaration (3); and, though they need not correspond exactly as to number or extent, yet they cannot be recovered, unless, at least, they are comprehended in the demand; the lessor of the plaintiff may recover less than he demands, though he cannot recover more.

Proof of  
ouster, when.

By the fictitious proceedings in this action, the defendant, the party in possession, is admitted to defend on condition of his entering into a rule to confess, at the trial of the cause, the lease of the supposed lessor of the plaintiff, the plaintiff's entry, and ouster. These are the usual terms on which he is admitted to defend. But if the defendant is tenant in common, or joint tenant, or parcener, with the lessor of the plaintiff, (in which cases, since the possession of the defendant is *prima facie* the possession of all the co-tenants, an actual

(1) Treport's case, 6 Rep. 14 b. Co. 12 East, 221. See *infra*, the same case more fully stated.

(2) Doc dem. Clarke v. Grant, (3) See Vol. I. p. 230. as to variations in place.

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point of legal operation, enure as several leases. However, there are many authorities to show, that tenants in common cannot join in a demise, in an action of ejectment. See Co. Litt. 200. a. *Mantle v. Wollington*, Cro. Jac. 166. *Moore v. Fursden*, 1 Shower, 342. *Heatherley dem. Worthington v. Weston*, 2 Wils. 222.

ouster must be proved,) the Court, whence the proceedings issue, will allow him, on proper affidavit, to confess only lease and entry, without also confessing ouster. If this course has been taken, the consent-rule is not evidence of the ouster, as it would be, if it were general to confess ouster as well as lease and entry; and, therefore, the ouster must be proved by other means, as, by showing, that the defendant held adversely, or that he denied the title of the other co-tenants, or claimed the whole of the premises for himself, or denied possession to the others, or took the whole of the profits and refused to account, or had the sole and undisturbed possession for a long course of years without payment of rent, and without any claim of any part of the profits by the other co-tenants during the whole of the time. (1)

An actual entry upon the premises is necessary only in the single case, where a fine has been levied with proclamations, (that is, provided the fine operates to divest the lessor's estate,) and where the proclamations have all been made before the time of bringing the ejectment (2); and this entry must have been made within a year before the commencement of the action. (3) The statute of Henry VII., respecting fines (4), is express upon this subject: the words are, "the said proclamations being so had and made, the said fine shall be a final end, and conclude as well privies as strangers to the same, except women covert, (other than parties to the said fine,) and every person then being within age of twenty-one years, in prison, or out of this realm, or not of whole mind at the time of the said fine levied, nor parties to such fine; and saving to all persons and their heirs, (other than the parties in the said fine,) such right, claim, and interest, as they have in the lands, tenements, and hereditaments, at the time of such fine engrossed, so that they pursue their title, claim, or interest by way of action or lawful entry, within five years next

Proof of  
entry, when.

(1) Doe dem. Fisher v. Prosser, 1086. 15 East, 489. S. C. Compers Cowp. 317. Doe dem. Hellings v. v. Hicks, 7 T. R. 727. Bird, 11 East, 49.

(2) Berrington v. Parkhurst, 2 Str.

(3) By st. 4 Ann. c. 16. s. 16.

(4) St. 4. 5 H. 7. c. 24.

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*after the proclamations made."* In all other cases, (excepting this, where a fine has been levied with proclamations,) the confession of lease, entry, and ouster, is sufficient. (1) An actual entry is not necessary to avoid a fine at common law without proclamations (2); nor is it necessary to avoid a fine with proclamations, unless the proclamations have all been made at the time of the commencement of the action (3); nor will it be necessary on a clause of re-entry for non-payment of rent (4), or for the breach of a condition. (5)

These general observations being premised, we may proceed to consider the several cases, in which an action of ejectment is usually brought. And the order, in which it is proposed to treat of this subject, is, first, the case of an ejectment by a landlord against his tenant; secondly, of an ejectment by an heir at law; thirdly, by a devisee; fourthly, by a guardian; fifthly, of an ejectment by a person claiming lands under an execution, as, by a tenant by elegit, conusee of statute merchant, statute staple, &c.; sixthly, of an ejectment by a mortgagee; seventhly, of an action of ejectment by a parson; and, lastly, may be considered the action of trespass for mesne profits, with which the chapter will close.

1. Action by  
landlord on  
determination  
of tenancy.

I. The simplest case of ejectment, with respect to evidence, is, where the action is brought by a landlord against his tenant, on a determination of the tenancy. The facts which the lessor of the plaintiff will have in this case to prove, are, the demise by him to the defendant, and the determination of that demise. A tenancy may be determined by the running out of the term, or upon some contingency, or by the breach of a condition or covenant; and, in the case of a tenancy from year to year, by a regular notice to quit at the end of the current year.

(1) 3 Burr. 1897.

(2) Jenkins dem. Harris v. Pritchard, 2 Wils. 45. See 2 Woodeson Lect. 356. (g), and Tapner dem. Peckham v. Merlott, Willes, 177.

(3) Doe dem. Duckett v. Watts, 9 East, 17.

(4) Goodright dem. Hare v. Cator, 2 Doug. 477.

(5) By Lord Mansfield, in Oates dem. Wigfall v. Brydon, 3 Burr. 1897. 1 East, 574. 3 Maule & Selw. 275.

First, of the action of ejectment by a landlord after the expiration of the term.

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tenant.

1. Ejectment  
on expiration  
of term.

Proof of  
demise.

The demise to the defendant, if by deed or other writing, may be shown by proof of the counterpart of the lease (1); or, if there is no counterpart, by giving secondary evidence of the contents of the lease, which will be admitted after service of a notice to produce the original. (2) Where the demise is by parol, it may be proved by a witness present at the time of the letting, or by an admission of the defendant. And the proof of payment of rent by the half-year, or by the quarter, is *prima facie* evidence of a tenancy, at least, from year to year.

It has been before mentioned, that, if several persons join in a lease to the plaintiff, they must appear to have such an interest in the premises as will enable them to join. Proof of payment of rent to their common agent, on behalf of all, is sufficient to support the joint demise, such payment being an admission by the defendant, that he held under all jointly; and though it should appear on the examination of the agent, that he had been appointed by the several parties at different times, and that some of the parties had not been entitled to rent till after his appointment, yet this is not such proof of a tenancy in common, (even supposing that tenants in common cannot join in a lease to the plaintiff,) as to outweigh the conclusion resulting from the payment of one entire rent (3); for, as Lord Ellenborough said, "in favour of the lessors of the plaintiff, whose tenant (the defendant) held out against them, his act in paying the one entire rent to their clerk, should enure in the most beneficial way for them, in support of their title as brought forward by themselves, unless the defendant had expressly proved them to be entitled in a different manner."

(1) *Roe dem. West v. Davis*, 7 East, 363. See Vol. I. p. 446.

(3) *Doc dem. Clarke v. Grant*, 12 East, 221.

(2) See Vol. I. p. 454.

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tenant.

Expiration of  
term.

The expiration of the term will be proved by the same evidence which proves the lease; namely, by the counterpart, or by secondary evidence of the contents of the lease; and if the duration of a term depends upon a certain event, that event must be proved to have happened.

Landlord's  
title not to be  
disputed.

The lessor of the plaintiff will not be obliged to prove his title to the demised premises; for the landlord's title is admitted by a tenant, who accepts a lease from him, and on the faith of the lease occupies the premises, paying rent. Neither the tenant, nor any person claiming under him, will be allowed to dispute the landlord's title. Nor can the tenant put a third person in possession, so as to enable him to set up an adverse title at the trial of an ejectment. (1) In the case of *Driver, on the demise of Oxenden, v. Lawrence* (2), where it appeared that the defendant's father had paid rent to a landlord, under whose will the lessor of the plaintiff claimed; and the defendant also, who succeeded the father, had paid rent accruing in the life-time of that landlord, but after his death refused to pay any subsequent rents by the direction of a third person who claimed the estate, respecting whose title some evidence was admitted on the trial of the action, the Court of Common Pleas, on a question reserved as to the right of the lessor of the plaintiff to recover, expressed some surprise at the manner in which the title had been disputed, and said they would not endure, that the defendant, who was the lessee of the devisee (the lessor of the plaintiff,) or claimed under him, should defend an ejectment against his own landlord on a supposed defect of title. That the tenant shall not be permitted to set up any objection to the title of his landlord under whom he has held, is not a mere technical rule, but one founded in public convenience and policy. (3) Nor is this any hardship upon a third person, who sets up a title to the estate; but the most convenient and fairest mode of trying his title, will be by an

(1) *Doe dem. Knight v. Smythe*,  
4 Maule & Selw. 347.

(2) 2 Blackst. 1359.

(3) *Ld. Ellenborough, in Hodson  
v. Sharpe*, 10 East, 353.



action against the tenant, in which case the landlord will have a full opportunity of defending his right.

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tenant.

But though the tenant cannot dispute the title of the landlord, under which he held, yet he will be allowed to show, that such title expired, or was determined, subsequently to the time of his last payment of rent. Thus, where the defendant was under-tenant to the lessor of the plaintiff from year to year, proof has been admitted that the original lease expired during the last year of the tenancy, at the end of which the defendant had notice to quit. (1) So, in the case of Doe on the demise of Jackson v. Ramsbottom (2), the defendant was allowed to show, that the lessor of the plaintiff, under whom he had occupied as tenant, claimed by a conveyance in fee from a deceased person who had only a life estate,\* and, as he had paid rent to the lessor of the plaintiff only during the continuance of that life-estate, the Court of King's Bench were of opinion, that this proof of the determination of the landlord's title was a good defence. Here the defence was not inconsistent with the defendant's admission of the landlord's title, as it would have been, if he had attempted to show the expiration of the title at a period for which he paid rent; but where this is the case, that is, where he has paid rent during the precise time when the title is supposed to have been determined, such a defence appears not to be admissible.\*

Secondly, of the action of ejectment by a landlord on a forfeiture of the term.

(1) England dem. Syburn v. Slade,  
4 T. R. 682.

(2) 5 Maule & Selw. 516. Doe  
dem. Lowden v. Watson, 2 Starkie,  
N. P. C. 231.

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\* In the case of Doe on the demise of Jackson v. Ramsbottom, it is expressly stated, that there was no payment of rent after the expiration of the title. The same fact may be inferred in the case of Doe on the demise of Lowden v. Watson, from the words of Lord Ellenborough; and it seems most probable also from the statement in the other case, above cited, of England dem. Syburn v. Slade.

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tenant.

2. For a for-  
feiture.

An ejectment is frequently brought on a clause of re-entry reserved in a lease, to recover the premises, as having been forfeited by the breach of some covenant. In this case, as the declaration supplies no information respecting the alleged causes of forfeiture, the defendant may compel the lessor to give him a particular of the breaches of covenants, and the lessor at the trial will be confined to this particular. (1)

Forfeiture by  
non-payment  
of rent.

The most common cause of forfeiture is for non-payment of rent. And in an ejectment brought for this cause, if the landlord proceed as for a forfeiture at common law, great nicety and strictness are requisite in all the preliminary steps. In the first place, the tenancy is to be proved in the regular manner (2); and, for this purpose, the counterpart of the lease is evidence not only against the original tenant, but also against his assignee, who has held under the same lease. (3) Or the tenancy may be proved by secondary evidence of the lease, after due notice to the defendant to produce the original. (4) And the power of re-entry will be shown by the counterpart, or other evidence of the lease.

Demand of  
rent.

A demand of the reserved rent is also necessary, in order to take advantage of the condition (5), unless it has been dispensed with by the express agreement of the parties. (6) A demand of the precise sum, due for rent, must be proved to have been made precisely upon the day, when it became payable, at the place appointed for the payment, or, if no place is appointed, on the most notorious part of the demised premises, and at a convenient time before sun-set. (7) The demand may be made by an agent in the name of the lessor, under a power of attorney; in that case the authority must be proved, and the

(1) Doe dem. Birch v. Philips,  
6 T. R. 597.

(2) See ante, p. 229.

(3) Roe dem. West v. Davis, 7 East,  
363.

(4) See Vol. I. p. 454.

(5) Co. Litt. 202. a. Borough's  
case, 4 Rep. 75. Willes, Rep. 506.

(6) Goodright dem. Hare v. Cator,  
2 Doug. 477. 485.

(7) Co. Litt. 202. a. The cases  
which require the observance of these  
several particulars are collected in  
1 Saund. 287. n. 16., Duppa v.  
Mayo.

agent ought to notify it to the tenant at the time of the demand, though it will not be necessary to produce it, if the tenant is satisfied without the production. (1)\* These several requisites being strictly performed, (for the common law requires the utmost strictness, where the condition tends to the defeasance of an estate,) the lessor will be entitled to re-enter. However, an actual entry will not be necessary, whether the lease is for years or for life; but the confession of entry by the defendant will be sufficient for this purpose. (2)

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tenant.

The defendant, in answer, may show any ground to save himself from the forfeiture; as, that he offered the rent to the lessor some time on the last day of payment. This will save him, where the money is to be paid on the day indefinitely, though he did not offer it upon the most notorious part of the premises, nor at the last instant; and the lessor will be bound to receive it or else, as Lord Coke says, he shall not take any advantage of any demand of the rent for that day. (3) Or the defendant may show, that the right of re-entry, and the forfeiture, have been waved by the lessor, in the case of a lease for years, by his acceptance of rent accruing since the cause of forfeiture, provided he knew of the cause (4); for by this acceptance he admits the continuance of the lease, and

(1) Roe dem. West v. Davis, 7 East, 363.

(5) Co. Litt. 302. a.

(2) The rule was so settled in the time of Lord Hale, and has been since observed. Little v Heaton, 2 Ld. Raym. 750. 3 Burr. 1897. Goodright dem. Hare v. Cator, 2 Doug. 477. 485.

(4) Pennant's case, 5 Rep. 64. Goodright dem. Walter v. Davis, Cowp. 803. Roe dem. Gregson v. Harrison, 2 T. R. 425. Co. Litt. 211 b.

\* The same strictness of proof, as to the previous demand, is requisite in order to entitle the lessor to recover what is called a *nomine pence*, that is, where there is a proviso, that if the rent is in arrear for such a time after the days of payment, the lessee shall forfeit a sum of money as a penalty. (a)

(a) 1 Roll. Ab. 469 (2). pl. 5. Maund's case, 7 Rep. 28. b. Willes Rep. 506, 507.

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tenant.

recognises the relation of tenant as still subsisting. But if there is a condition in the lease for years, that for non-payment of rent the lease shall be null and void, there the acceptance of rent, due after the breach of the condition, will avail nothing, and cannot give continuance to the lease. (1) A distinction, however, in this respect, is to be observed between a lease for years, which may be absolutely determined and extinguished on a certain event, and a lease for life, which is voidable only by entry. In the latter case, though there may be a condition, that the lease shall be void on non-payment of rent, yet, as the estate commences by livery, it cannot be determined before entry, and an acceptance of rent, due after the non-payment, will be a waiver of the forfeiture, and an affirmance of the lease, as in the case of a lease for years without such condition. (2) \*

Demand of  
rent, when  
dispensed  
with.

The great niceties in making a demand for rent, formerly necessary to be observed, in order to take advantage of a power of re-entry for non-payment, have been removed in certain cases by a modern statute, st. 4 G. 2. c. 28. (3), which was intended to obviate the inconveniences resulting from the strictness of the common law. That statute dispenses with the necessity of a previous formal demand, by providing, that where half a year's rent is in arrear, the landlord or lessor, to whom the rent is due, instead of making a demand and re-entry, may serve a declaration in ejectment for the recovery of the demised premises; or, in case it cannot be

(1) Pennant's case, 3 Rep. 64. b. Manning's case, 8 Rep. 95. b. Co. Co. Litt. 215. a. Jones, dem. Cowper v. Verney, Willes, Rep. 176. Litt. 215. a.

(2) Pennant's case, 3 Rep. 64. b. (3) This statute provides also a method of proceeding, in case of judgment against the casual ejector.

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\* When the ground of forfeiture is a breach of some other covenant, as of a covenant to use the premises for a particular purpose, not to carry on a particular trade, &c., a waiver can only be by some act done by the landlord affirming the tenancy, such as the acceptance of rent, or the like; a mere knowledge and acquiescence in those acts of the tenant which constitute the forfeiture, will not amount to a waiver. (a)

(a) Doe dem. Sheppard v. Allen, 5 Taunt 78.

legally served, or if no tenant be in actual possession of the premises, then he may affix it upon the door of any demised messuage, or, in case the ejectment is not for the recovery of any messuage, upon some notorious place of the premises: and at the trial of the action, when the defendant appears, the lessor will have to prove the service of the declaration in ejectment in the usual manner (1), or, under the circumstances above specified, may prove the affixing of the declaration, this service or affixing being substituted in the place of a demand and re-entry; and further he must prove, that half a year's rent was due before the service of the declaration. He will have also to prove, that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that he had power to re-enter.

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tenant.

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As to the proof of the time of searching for a distress, and of finding it insufficient, the search must of course be proved to have been after the rent had become due, and after the expiration of the time of payment; and it must be shown to have been before the day of the demise in the declaration, or at least there must be *prima facie* evidence, that, at the time when the demise is laid, there was not a sufficient distress. In the case of Doe on the demise of Smelt v. Fuchan (2), the proviso was for re-entry in case the rent was unpaid for the space of fourteen days after either day of payment; the demise was laid on the 2d of May, 1811; half a year's rent was due on the Lady-day preceding; and it appeared that the broker went upon the premises for a distress on some day in May, but found nothing to distrain upon; the counsel on the part of the defendant contended, that it ought to have been shown, that there was no sufficient distress on the premises for fourteen days after the rent was due, and that there was none at the time of the service of the declaration. But the Court held, that there was at least sufficient *prima facie* evidence to call upon the defendant to

(1) The cases as to the service of the declaration are collected in Adams's Treatise on Ejectments, p 207. 210.

(2) 15 East, 286.

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tenant.

show, that a sufficient distress had been on the premises within the proviso; and the jury might presume, from the fact of there being no sufficient distress some time in May, that there was none in May before the 2d, when the demise was laid, nor at the time when the declaration was served, if that were material.

The cases, then, to which the statute applies, are, where half a year's rent is in arrear, and where there is not sufficient distress to countervail the arrears; and, in such cases, the service of the declaration in ejectment is substituted in the place of a formal demand. Even if a demand of rent is expressly required by the lease, previous to the entry, (as where the condition is, that if the rent should be unpaid for so many days next after any of the days of payment, being lawfully demanded, the lessor should have a right to re-enter,) yet this has been considered a case within the provisions of the statute; and if more than half a year's rent is in arrear, and there is not a sufficient distress upon the premises, a demand has been held to be unnecessary. (1) But in other cases, not provided for by the statute, namely, either where half a year's rent is not due, or where the distrainable goods upon the premises are sufficient to discharge the arrears, there the landlord, in order to take advantage of a power of re-entering for non-payment, must still comply with the requisites of the common law. (2)

(1) Doe dem. Scholefield v. Alex- Ch. J. Mansfield, on the doctrine laid  
ander. 2 Maule & Selw. 525.\* down in this case, in Smith v.  
(2) Doe dem. Wandlass v. Foster, Spooner, 3 Taunt. 252.  
7 T.R. 117. See the remark of

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\* Lord Ellenborough C. J. in this case, (who differed from the other judges of the court in construing the clause in question,) considered a previous demand necessary; not a demand with all the strictness of the common law, but, at least, some effectual demand according to the stipulation of the parties. The other judges construed the words *lawfully demanded*, as referable to a demand at common law, such as would be sufficient to authorise a re-entry; and since no other demand is substituted by the statute for that which the law would have required before the statute, where a demand had been provided for by the stipulation of the parties, they held, that the statute applied to this case, and dispensed with a demand

Thirdly, of the action of ejectment by a landlord on the determination of a yearly tenancy by a regular notice. Landlord v. tenant.

The most common case of ejectment between landlord and tenant is that on the determination of a tenancy from year to year. This sort of tenancy is determined by a regular notice to quit; and the general rule in common yearly tenancies is, that this notice must be served at least half a year previous to the expiration of the current year of the tenancy. (1) A few observations respecting the proof of these notices will be sufficient.

3. On determination of yearly tenancy.

A written notice to quit may be proved by a duplicate original, without proof of a notice to produce the one delivered. (2) But the notice delivered must be proved to have been properly signed, and, if it was attested, the attesting witness ought regularly to be called to prove the signature. (3) A parol notice, which is as effectual as one in writing, unless there is a stipulation for a written notice, though not so convenient or so safe, may be proved by a third person who delivered it, or by one who heard it delivered.

Proof of notice.

The time for quitting, mentioned in the notice, ought to correspond with the close of the current year's tenancy; and some evidence of this fact will be necessary. If a notice, to quit on a particular day, was served personally on the tenant, and he made no objection to the time mentioned in it, when he had an opportunity of objecting, this of itself has been considered as evidence of an acquiescence on his part, and of an admission that the tenancy would expire as the notice represents. (4) Where the notice is not to quit on a particular day, but in a more general form, (as, to quit at the expiration of the term or current year,) such notice, however the tenant may assent to it, affords no kind of information;

(1) See cases in Selwyn, N. P. as to notice on Michaelmas-day to quit on Lady-day, though not strictly half a year.

(2) See Vol. I. p. 448.

(3) *Ib.* p. 463.

(4) See Vol. I. p. 107.

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tenant.

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other evidence, therefore, will be requisite as to the regular time of quitting. And this may be supplied, in some cases, by the conduct of the tenant, on being served with the declaration in ejectment. Thus, where a notice has been given to quit at the expiration of the current year, and a declaration in ejectment was served nearly a year afterwards, laying the demise half a year after the notice, and the tenant, on being served with the declaration, made no objection to the notice to quit, nor set up any right to a longer possession of the premises, there the declaration in ejectment had the effect of qualifying the generality of the notice, and was considered as pointing out a specific time, when the notice to quit was intended to operate (1); Lord Ellenborough held, that it was a question for the jury to determine, whether the tenant must not be understood, from the circumstance of not making any objection, as having admitted, that the tenancy was determined by the notice. If on receiving the notice the tenant were to express displeasure, or complain of being hardly treated, his conduct, so far from evincing any degree of assent to the notice, would prove directly the reverse. (2)

Notice by  
agent.

When the notice is given by an agent, some proof of the agent's authority will be requisite. This may be proved by the agent, who delivered the notice; and the mere bringing of the ejectment in the name of the landlord, where the tenant holds under a single person, seems to be a sufficient recognition of the act done by the agent, on the principle that *omnis rati-habitio retrahitur, et mandato æquiparatur*. (3) But if the defendant holds under several landlords, the mere fact of bringing the ejectment in their names will hardly be sufficient, as it may have been brought by one of the lessors in the name of all without any joint authority; some further evidence therefore seems necessary, such as proof by the attorney, that the action has been brought under the joint direction of the

(1) Doe dem. Woombwell v. Baker, 2 Campb. 559.

(2) Oakapple dem. Green v Cope, 4 T.R. 361.

(3) See 5 East, 497. 499.



several lessors; or if a written authority to the agent, to give the notice, is produced at the trial, bearing the signatures of all the lessors, and signed by them before the commencement of the action, this also will be sufficient, although it appear not to have been signed by all of them before the delivery of the notice. (1) The maxim of law, "*omnis rati habitio*," &c., here applies; and the subsequent recognition by all the lessors gives effect to the authority. In the case of a notice given by the steward of a corporation, it will be necessary to prove him such; but, as steward, he is competent to give the notice, without a power under the corporation-seal, the corporation, by bringing the ejectment, having recognized his act. (2)

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tenant.

The notice must be proved to have been regularly served. And this service may be personally upon the tenant, which is the best of all modes, if practicable; or it may be on the tenant's wife, who lives with him, or on the tenant's servant at his house, though the house may not be situated on the demised premises. (3) Lord Kenyon said, in the case last referred to, that leaving a notice at the dwelling-house of the party had always been deemed sufficient (4); and added, that the distinction was between process to bring the party into contempt, and a notice like that which the Court were then considering, the former of which only need be personally served. In the case of a joint demise to two defendants, of whom one alone resided upon the premises, proof of service of the notice upon him has been held to be a sufficient ground for the jury to presume, that the notice, so served upon the premises, had reached the other, who resided in another place. (5) And if the tenant has under-let to another, between whom and the landlord there is no privity, the notice is to be served upon the tenant, not on the under-tenant. (6)

Service of  
notice.

(1) Goodtitle on demise of King and Others v. Woodward, 5 Barn. & Ald. 689.

(2) Roe dem. Dean and Chapter of Rochester, v. Pierce, 2 Campb. 96.

(3) Jones dem. Griffiths v. Marsh, 4 T. R. 464. The contents of the notice were explained to the servant; but there was no direct evi-

dence of the notice having come to the hands of the master.

(4) See Doe dem. Buross v. Lucas, 5 Esp. N. P. C. 153.

(5) Doe dem. Lord Bradford v. Watkins, 7 East, 553. Doe dem. Ld. Macartney, v. Crick, 5 Esp. 196.

(6) Roe v. Wiggs, 2 New Rep. 330.

Landlord v.  
tenant.

Declarations  
of tenant.

The representations of the tenant as to the commencement or close of his tenancy, are evidence against him; and, if his landlord has applied to him for information respecting the time of his holding, and given the notice conformably with his statement, the tenant will be precluded from disputing the regularity of the notice upon this point; for, after leading the other party into an error, it is only reasonable, that he should immediately correct it, or suffer all the inconveniences resulting from his mis-statement, whether it proceed from mistake or design. (1)

Receipt of  
rent.

A receipt of rent also, stating it to be a year's rent up to a particular day, is *prima facie* evidence of the commencement or holding from that day. (2) The effect of such a receipt would be neutralised by another receipt, produced on the part of the defendant, for a year's rent up to a day at the end of a different quarter, the question as to the commencement of the tenancy being thus involved again in obscurity and doubt; or the receipt for the year's rent may be more effectually answered, by producing a lease which created the yearly holding, or by producing the lease of a term, at the expiration of which the yearly holding commenced; and the circumstance of there having been several successive tenants after the expiration of the lease, cannot make any essential difference. (3)

II. Ejectment  
by heir at law.

II. The cases which have been hitherto considered, are those in which the relation of landlord and tenant has subsisted, and on which consequently the title of the lessor has been admitted. We proceed now to cases of another kind, where the lessor of the plaintiff will be obliged to prove a strict legal title. And, first, as to the case in which the lessor of the plaintiff claims by descent, as heir at law of the person last seised of the property.

(1) Doe dem. Eyre v. Lambley,  
2 Esp. N. P. C. 635.

(2) Doe dem. Castleton v. Samuel,  
3 Esp. N. P. C. 173.

(3) S. C.

There are two propositions to be established in this case : By heir at first, that the person, from whom the party claims, was last <sup>law.</sup> seised of the actual freehold and inheritance, or, in other words, was last actually in possession of the lands in fee-simple ; for the common law required this notoriety of possession as evidence of the property being in the ancestor, from whom it might be transmitted ; and, secondly, that the claimant is the heir at law of such ancestor.

The seisin of the deceased is proved by showing his actual <sup>Proof of</sup> possession of the premises, or by proving his receipt of rent <sup>seisin.</sup> from the person in possession (1) ; this is presumptive evidence of a seisin in fee, and sufficient until the contrary appear. The declarations of a deceased occupier of the land in question, that he held as tenant under a particular person, have also been admitted as evidence of the seisin of that person. (2) Further, proof of possession in the ancestor's lessee for years is still stronger evidence of his seisin ; for the possession of the lessee is the possession of him who has the inheritance. (3) So also, the possession of a guardian in socage is the possession of the ward, who thereby acquires an actual seisin without entry. (4)

The necessity of an actual seisin is confined to those cases only, in which the fee-simple remains entire ; and the rule will not apply where the estate is carved out into several remainders ; as, where an estate is limited to A. for life, with remainder to B. in tail, with remainder to C. in fee, and C. dies during the life of B., and afterwards B. dies in possession without issue ; here the heir at law of C. may claim by descent, though his ancestor, who was the first purchaser, never had actual possession ; and to substantiate his claim, he must prove himself heir to such purchaser, at the time

(1) Co. Litt. 15. a. Bull N. P. 103. (3) Co. Litt. 245. a. Goodtitle dem. Newman v. Newman, 3 Wils.

(2) Uncle v. Watson, 4 Taunt. 16. 516. (4) Co. Litt. 15. a. See Vol. I. p. 259.

By heir at  
law.

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when the precedent particular estate determined, and when the remainder would vest in possession. (1) And so one may claim a reversion as heir of the original grantor, after the expiration of all the precedent estates created by the grant, though he may not be able to claim as heir of the person last seised. (2)

Proof of being  
heir at law.

As to the second point, namely, that the claimant is heir at law of the person from whom he claims, he will have to show, either that he is lineally descended from him, or, if he claims collaterally, that they are both of them sprung from the same common ancestor; and, further, that all the branches interposed between the claimant and the ancestor, which, if in existence, would have a preferable title, are extinct. (2)

Registers.

In tracing a pedigree, the several facts of births, of marriages, and deaths, may be proved by examined copies of entries in parish-registers. (3) The entries are evidence of what they purport to record; namely, that certain persons, there described, were baptised, married, or buried, at a particular time and place.

Declarations.

Where the relationship is remote, the information of witnesses from their own personal knowledge cannot be expected to go back to any very distant period; and resort must, therefore, necessarily be had to other sources of information, the best that the nature of the case will allow. On this principle, the declarations of deceased members of the family are admissible evidence to prove relationship, marriages, or deaths. (4) And a memorandum in a book preserved by the family, descriptions on monuments, recitals in family deeds, or other particulars of a similar kind, are admis-

(1) Ratcliffe's case, 3 Rep. 42. a.

(2) On this subject, see Vol. I. p. 258. See also Index of Contents, 294. (a). Roe dem. Thorne v. Lord, title Pedigree.

2 Black. Rep. 1099.

(3) See Vol. I. p. 409.

sible for the same purpose, and precisely upon the same principle. (1) \* By heir at law.

The ancient books of the Heralds' Office, and their visitation-books of counties, are evidence on a question of pedigree. (2) But a pedigree drawn out by a herald at arms, unaccompanied by any regular proof from the office, is clearly inadmissible. (3) And a recital in an act of parliament, stating J. S. to be the heir at law of a particular person, has been held not to be evidence. (4) Heralds' books.

Where the claim is by collateral descent, the claimant, as was before mentioned, must prove himself and the deceased to have sprung from the same common ancestor; and, to this end, it will be sufficient to show, that they are both descended from two brothers or two sisters. (5) And if he claim the estate, as originally coming from a female ancestor, (whether he claim as heir by lineal or by collateral descent,) he will have to show, not only that she is the common ancestor, as in ordinary cases, but also that the mother of such female ancestor was seised of the estate, and that it descended from her to the person last seised. Collateral descent.

The question of legitimacy, or illegitimacy, frequently arises, on the part of the defendant, as a defence to the ejectment, when the action is brought by one claiming as heir at law. If the lessor of the plaintiff claim by heirship, immediately as Defence. — Illegitimacy.

(1) On this subject, see Vol. I. son, 2 Roll. Abr. title Trial. (I). p. 259. See also Index of Contents, pl. 2. p. 686. title Pedigree.

(2) See Vol. I. p. 421.

(3) Case of Plumptre and Robin-

(4) Anonym. case, 12 Mod. 384.

(5) Roe dem. Thorne v. Lord,

2 Black. 1100.

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\* This subject, and some others connected with it, having been already considered at length in the former volume, it will be more convenient to refer to those passages, than merely to repeat them here. As to the presumption of the death of a person after a certain time, see Vol. I. p. 198. As to declarations *post litem motam*, see Vol. I. p. 242. As to hearsay respecting the place of birth, see Vol. I. p. 240.

By heir at  
law.

the son of the person last seised, the defendant may show, that he is not the legitimate son ; or if he claim, as heir, through other persons interposed between himself and the person last seised, the defendant in that case may show, either that the lessor himself, or that some one of those through whom he claims by descent, is not legitimate. The illegitimacy of any one in the line of ancestors will make a complete chasm or breach in the pedigree ; an illegitimate person not having an ancestor, from whom any inheritable blood can be derived. The illegitimacy of a person may arise, either from being born out of lawful wedlock ; or, if born in wedlock, from not being the true child of the married parties.

1. Want of  
legal mar-  
riage.

First, as to the question, whether the individual, whose legitimacy is disputed, was born in lawful wedlock ; or, in other words, whether the mother of such individual was, at the time of his birth, lawfully married to his supposed father. It is a well-known principle of our law, that a marriage, although voidable for some *canonical* disabilities, (such as consanguinity, affinity, &c.) is not void until sentence of nullity has been declared, and is considered valid and operative for all civil purposes, unless such sentence is actually declared during the life-time of the parties : but *civil* disabilities, such as a prior marriage — want of age — want of reason — the want of consent of parent or guardian, when such consent is necessary, and the non-observance of certain solemnities required by the marriage-act — render the contract of marriage, not merely voidable, but absolutely void *ab initio*.

It will not be absolutely necessary for the party, who claims as heir, and has to maintain the lawfulness of a marriage, to prove, in the first instance, the regular publication of the banns, or the regularity of the licence, under which the marriage was solemnized ; the usual presumptive proofs, arising from the cohabitation of the parties as man and wife, have

(1) All the material clauses of the marriage-act are stated in Selwyn's N. P. title "Adultery."

not been taken away by the marriage-act(1); they are still admissible, as before the passing of that act; and it must often happen, especially in the case of old marriages, where the parties have been long dead, and the place of marriage is unknown, that such proof is all that can be supplied. On the other hand, it is open to the adverse party to disprove the regularity of the licence, or the regular publication of the banns; and if this is effectually done, the marriage will be absolutely void. But even in this case there may be sufficient ground for presuming a *subsequent* legal marriage, from the cohabitation of the parties as man and wife, and from the manner in which they were always received by their relations. Whether such a presumption is reasonable, the jury are to determine upon all the various circumstances of the particular case. In the case of *Wilkinson v. Payne* (2), where a question arose respecting the marriage of the plaintiff, it clearly appeared, that the marriage, when it first took place, was not legal; because the plaintiff was at the time a minor, and married after the death of his parents, without the consent of a legally-appointed guardian; yet, as the plaintiff and his wife had been always received and treated by the wife's father (the defendant) and by all his family, down to the time of her death, as man and wife, the Judge, who tried the cause, left it as a question for the jury, whether they would not presume a subsequent legal marriage: the jury presumed such marriage, and found a verdict for the plaintiff. In this case, too, there was a strong circumstance to encounter such a presumption; for it was proved, that when the plaintiff came of age, his wife lay on her death-bed, and died in three weeks afterwards. However, the Court of King's Bench were unanimous in refusing to grant a new trial. "Though the first marriage, said Lord Kenyon, was defective, a subsequent one might have taken place; the parties cohabited together for a length of time, and were treated by the defendant himself as

By heir at law.

(1) *St. Devereux v. Much Dew Church.* 1 Black Rep. 367. *Reed v. Passer*, Peake's N. P. C. 232.

(2) 4 T. R. 468., an action on a promissory note given to plaintiff, in

consideration of his marrying the defendant's daughter. The defence was, that there had not been a legal marriage.

By heir at  
law.

man and wife; these circumstances afforded a ground, on which the jury presumed a subsequent marriage."

Either of the married parties, provided they are not interested in the suit, will be competent to prove the marriage; either of them will also be competent to disprove the supposed marriage (1). The latter proposition seems to follow as a consequence from the former; if a person is competent to prove the legitimacy of his own children, he is not incompetent to prove their illegitimacy.

The declarations of a deceased person, as to the fact of his marriage, or as to the time of the marriage, are admissible in evidence, on a question of pedigree (2); and the declarations of deceased members of the family are evidence upon the same point. (3) But the declarations of a deceased person, who attended at the marriage as parish-clerk, that the banns had not been duly published, — or the declarations of the deceased clergyman, that the banns had been forbidden, and were therefore not published — are clearly inadmissible. (4)

2 Non-access,  
&c.

If the individual, whose legitimacy is disputed, was born during a lawful marriage, another question may still arise, namely, whether that individual was the true and legitimate child of the married parties. The maxim of the Jurists, "*Pater est, quem nuptiæ demonstrant*," was adopted by the common law with such extreme strictness, that, if it had appeared, that the husband was within the kingdom, or, in the quaint language of the times, *intra quatuor maria*, the only proof of illegitimacy, that could have been admitted, was the proof of his total disability of person, an apparent impossibility of procreation. (5) But this doctrine has been long

(1) *R. v. St. Peter's*, 1 Bott. 454.  
Bull. N. P. 112. S. C. Cowp. 595.  
*Healey v. Chesham*, 2 Bott. 70.  
*Standen v. Standen*, 10 B. & C. 101.  
32. *R. v. Bramley*, 6 T. R. 530.

(2) See Vol. I. p. 238. *May v. May*, Bull. N. P. 112.  
(3) See Vol. I. p. 238.  
(4) See Vol. I. p. 250.  
(5) Co. Litt. 244. a



exploded. (1) As early as the time of Edward the First, the fact of access or non-access appears to have been considered an important subject of enquiry (2); and Bracton lays down the rule in the following terms: "*Præsumitur quis esse filius hoc ipso, quòd nascitur ex uxore, quia nuptiæ probant filium esse, et semper stabitur huic præsumptioni, donec probetur in contrarium; ut ecce, maritus probatur non concubuisse aliquamdiu cum uxore, infirmitate vel aliâ causâ impeditus, vel erat in eâ invaletudine ut generare non posset, vel probatur quod absens fuit per decenerium, &c.*" (3) The principle, therefore, now clearly established, is this, that such circumstances, as show a natural impossibility, that the husband could be the father of the child, of which the wife was delivered, (whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, or from the physical impossibility resulting from the non-access of the husband,) are grounds on which the illegitimacy of the child may be founded. (4) In other words, the principle is, that when the husband could not, in the course of nature, have been the father of his wife's child, the child is by law a bastard. (5) Nor can it be necessary to prove the absolute impossibility of access, if the circumstances of the case strongly repel the presumption of access. (6) Access, or sexual intercourse, is certainly to be presumed during lawful wedlock; but this presumption may be encountered by proof of any circumstances, which satisfactorily show, that this sexual intercourse did not take place within such a time, that the husband could, according to the laws of nature, be the father; and the proof of these circumstances must be regulated by the same principles as are applicable to the establishment of any other fact. (7) When a woman is separated from

By heir at  
law.

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(1) See case of *Dickens v. Collins*, determined by Lord Hale, cited by the court, in case of *St. George and St. Margaret*, 1 Salk. 123. *Pendrel v. Pendrel*, 3 Str. 924. 3 P. Will. 276. Bull. N. P. 113.

(2) Case cited by Ld. Ellenborough, 8 East, 206.

(3) Bracton, ch. 9. p. 6. a.

(4) *R. v. Luffe*, 8 East, 206, 207.

(5) *Ib.* p. 205.

(6) *Goodright v. Saul*, 4 T. R. 356., cited by Le Blanc. J. 8 East, 212.

(7) See the points in the *Banbury peerage* case, in Selw. N. P. 681.

By heir at  
law.

her husband by a divorce *à mensâ et thoro*, the children born during such separation will be bastards, unless access is satisfactorily proved; for due obedience to the sentence of the Spiritual Court is to be presumed, until the contrary is proved (1); the party, therefore, who asserts the legitimacy of the children, ought in this case to prove access.

The mother of the child, whose legitimacy is questioned, will not be allowed to prove the non-access of her husband. (2) This rule, said Lord Ellenborough (3), is grounded on a principle of public policy, which prohibits the wife from being examined against her husband, in any matter affecting his interest or character, unless in cases of necessity, where, from the nature of the thing, no other witnesses are likely to have been present. The rule is observed so strictly, that she cannot be allowed to prove the fact of non-access, even after her husband's death. (4) But she is competent to prove the fact of her criminal intercourse with that person, whom she charges to be the real father of the child (5); this is permitted, from the necessity of the case, and the secret nature of the fact, which must generally be only within her own knowledge, and that of the adulterer's.

The declarations of the deceased mother are evidence as to the fact of her marriage (6), and as to the time of the child's birth. (7) But if the fact of the marriage is not disputed, and the question is on the legitimacy of a child born during marriage, the declarations of the deceased mother are not admissible as to the fact of non-access, which she would not have been allowed to prove in person. (8) Nor are her declarations admissible as to the illegitimacy of her child, or that the child

(1) Case of St. George and St. Margaret, 1 Salk. 123.

(2) R. v. Luffe, 8 East, 193.

(3) 8 East, 203. See also Cowp. 594.

(4) R. v. Kea, 11 East, 132.

(5) R. v. Reading, Rep. Temp. Hard. 82. 8 East, 203.

(6) See ante, p. 246.

(7) Goodright dem. Stevens, v. Moss, Cowp. 592. See Vol. I. p. 239.

(8) 8 East, p. 193.

was not her husband's child; "the law of England," said Lord Mansfield (1), "is clear, that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage." The utmost that the wife, if alive, could be allowed to prove, is her criminal connection with the person charged as the father of the child; and this is an exception to the general rule, permitted from the necessity of the case. (2)

By devise of  
freehold.

III. Having considered the title by descent, which is one of the modes of acquiring property, we proceed now to the next in order, the title by devise. And, first, of an ejectment by the devisee of a freehold interest.

III. Ejectment  
by devisee of  
freehold  
interest.

A freehold interest in real property, though not vested in possession, may yet be devised, under the Statute of Wills; as, a reversion, or remainder in fee (3), or an interest by virtue of an executory devise. (4) A party, therefore, claiming such an interest, will have to prove the seisin of the testator (5), the regular execution of his will, and the determination of all the precedent estates, upon which determination the interest, limited to him, is made to vest in possession. And a devisee, who claims immediately upon the testator's death, must also show the seisin of the deceased, as in the other case, and that his will has been duly executed. Something has been already said respecting the proof of seisin (6); and the regular mode of proving the execution of wills has also been so much considered, as to make it unnecessary to add any thing in this place. (7)

The heir at law, in answer to this title by devise, may show, if he can, that the will is a mere fabrication and forgery, or that the deceased was incompetent to make a will; as, by being a married woman (8), or within the age of twenty-one

Defence by  
heir at law.

(1) Cowp. 592.

(2) See Vol. I. p. 86.

(3) St. 34 H. 8. c. 5.

(4) Jones v. Roe, lessee of Perry,  
3 T. R. 88.

(5) See ante, p. 241.

(6) See ante, p. 241.

(7) See Vol. I. p. 500.

(8) St. 34, 35 H. 8. c. 5. s. 14.

By devise of  
freehold.

years (1), or by reason of mental incapacity, whether proceeding from idiocy or non-sane memory (1); or that the will was extorted by duress, or obtained by fraud, as, where one paper was obtruded on the testator for another, which he intended to execute (2); or that the testator had not a devisable estate, as, if he were tenant in tail. (3)

Incapacity of  
testator.

The mental incapacity of the testator, at the time of making the will, is a good ground of defence; for unless the testator was in a state of mind competent to do such an act, the supposed will, which must be a *testatio mentis*, is totally and absolutely void. The rule of law upon this subject is laid down thus by Lord Coke (4): It is not enough, he says, that the testator, when he makes his will, should have sufficient memory to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his lands with understanding and reason; this, he adds, is such a memory as the law calls sane and perfect.

Lucid interval.

If a party impeach the validity of a will on account of a supposed incapacity of mind in the testator, from whatever cause it may proceed, whether from a natural decay of intellect, from derangement, or partial insanity, it will be incumbent upon him to establish such incapacity by the clearest and most satisfactory evidence. The burden of proof rests upon the party attempting to invalidate what on its face purports to be a legal act. If he succeed in proving that the testator had been affected by habitual derangement, then it is for the other party, who claims under the will, to adduce satisfactory proof, that, at the time of making the will, the testator had a lucid interval, and was restored to the use of his reason. (5)

(1) St. 34, 35 H. 8. c. 5. s. 14.

(2) Doe dem. Small v. Allen,  
8 T. R. 147.

(3) An estate *pur autre vie* is devisable by Stat. of Frauds; and the

same forms are requisite as on the devise of an estate in fee-simple.

(4) Marquis of Winchester's case,  
6 Rep. 25. a.

(5) 3 Brown Ch. C. 440. Dr. Philimore's Rep. vol. i. p. 100,

Lord Thurlow has observed, in the case of the Attorney-General v. Parnter (1), that the evidence in support of the allegation of a lucid interval, after the proof of the derangement at any particular period, should be as strong, and as demonstrative of such fact, as where the object of the proof is to establish derangement. Perhaps it would be more just to observe, that if on the one side derangement has been clearly proved, a lucid interval must also be clearly and satisfactorily proved on the other side. But there appears to be no reason for requiring, in the proof of each of these several facts, precisely the same measure of evidence, or the same degree of demonstration. It is possible, that both facts may be most satisfactorily established, though the proof in the one case may perhaps not be so strong or so demonstrative as in the other. Insanity, from its peculiar nature, admits of more easy and obvious proof, than the existence of a lucid interval. The wildness and unnatural appearance of insanity can never be misunderstood; but whether light and reason have been restored, is often a question of the greatest difficulty. It may happen, therefore, that insanity at a particular period is established by such a body of cogent evidence, as to dissipate every possible shade of doubt, and to convince the mind of the truth of the fact, as strongly as of its own existence. But to insist on the same weight of evidence and the same degree of demonstration in the proof of a lucid interval, is requiring more than almost any case can be expected to supply, and perhaps more than the nature of the question will generally admit. "It is scarcely possible, indeed, to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognises acts done during such an interval as valid, and the law must not be defeated by any over-strained demands of the proof of the fact." (2)

By devise of  
freehold.

Nor can it be necessary to prove, that the patient had been restored to as perfect a state of mind, as that which

(1) 3 Brown Ch. C. 443.

(2) See Sir John Nicholls's judg-

ment in *White v. Driver*, Dr Phillimore's Rep. Vol. I. p. 88.

By devise of  
freehold.

he had before his derangement, in order to be competent to make his will, or do any other legal act. "The strongest mind," as Lord Eldon observes (1), "may be reduced, by the delirium of a fever, or some other cause, to a very inferior degree of capacity; but the conclusion is not just, that, because the person is not what he had been, he should not therefore be allowed to make a will." A great intellect may lose half its powers, and still retain more reason than falls to the lot of the common order of minds. All that the law requires, is, that the person should be restored to a "disposing mind," capable of doing an act of thought and judgment; not that he should regain all the powers of intellect, which distinguished him before his malady.

Some very sensible remarks on the subject of lucid interval have been made by Sir W. Wynne in a case lately reported, in the Court of Prerogative. (2) After observing that a person is not incapacitated, even after general habitual insanity, provided there is an intermission of the disorder at the time of the act, and that where an habitual insanity is established, there the party, who would take advantage of the fact of an interval of reason, must prove such fact, Sir W. Wynne proceeds thus: "Now, I think the strongest and best proof, that can arise, as to the lucid interval, is that which arises from the act itself; that I look upon as the thing to be first examined; and, if it can be proved and established that it is a rational act, rationally done, the whole case is proved. In my apprehension, where you are able completely to establish that, the law does not require you to go further; and the citation from Swinburne states it to be so. The manner in which he has laid it down, is, 'If a lunatic person, or one that is beside himself at times, but not continually, makes his testament, and it is not known whether the same were made

(1) *Ex parte Holyland*, 11 Ves. 11.

(2) *Cartwright v. Cartwright*, Dr. Phillimore's Rep. vol. 1. p. 90. 101. The whole of the judgment of Sir W. Wynne in this case is highly

interesting, from the great variety of sensible observations with which it abounds, as well as from the clearness and fullness of the comment upon the evidence.

while he was of sound mind and memory, or not, then, in case the testament be so conceived as thereby no argument of phrenzy or folly can be gathered, it is to be presumed, that the same was made during the time of his calm and clear intermission, and so the testament shall be adjudged good; yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet, nevertheless, I suppose, that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.' Unquestionably," continues Sir W. Wynne, "there must be a complete and absolute proof, that the party, who had so framed it, did it without any assistance. If the fact be so, that he has done, without assistance, as rational an act as can be, what there is more to be proved I do not know, unless it can be shown, by any authority or law, what the length of the lucid interval is to be, whether an hour, a day, or a month; I know no such law as that: all that is wanting, is, that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact, that the act done is perfectly proper, and that the party, who is alleged to have done it, was free from the disorder at the time, that is completely sufficient."

By devisee of  
freehold.

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The heir at law may set aside the will, by proof of an actual revocation. The form of revoking a will is described in the 6th section of the Statute of Frauds, which enacts, "that no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt or cancelled, torn or obliterated, by the testator or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor,

Revocation  
of will.

By devise of freehold. signed in the presence of three or four witnesses, declaring the same."

As to the first-mentioned mode of revoking a will, namely, that of altering it by some other will or codicil in writing, it seems to be clearly settled, that the second will or codicil cannot have the effect of revoking a former one, notwithstanding that it contain a general clause of revocation, unless it be proved to have been duly and formally executed, according to the requisitions of the fifth section (1); for, being intended to be a will, and to revoke as such, it must have all the solemnities and forms of a will, or it cannot operate as a revocation. And further, if the second will does not expressly revoke, it revokes only so far as it appears to be clearly inconsistent with the former devise as to the particular subject-matter of that devise (2); for the words of the statute are express, that all devises shall remain in force, unless altered by some other will.

The next-mentioned mode of revoking is by some other writing of the devisor, declaring an intention to revoke. This must be signed in the presence of three or four witnesses; but the statute has not required the witnesses to subscribe or attest in the presence of the devisor, nor indeed to subscribe at all; nor does this appear by any means necessary. (3)

Another mode of revocation is by burning, or cancelling, tearing, or obliterating, by the testator himself, or in his presence, and by his directions and consent. These acts are in their nature equivocal, and their effect, as a revocation, must entirely depend upon the intention with which they are accompanied. A will may be cancelled by mistake, or by accident; but such a cancelling is not a revocation. On the

(1) *Ecclestone v. Speake*, 1 Show. 89., better reported in Carth. 80. *Onions v. Tyrer*, 1 P. Will. 342. *Limberg v. Mason*, Com. 454.

(2) *Harwood v. Goodright*, *leace* of Rolfe, Cowp. 87.

(3) *Townsend v. Pearce*, Vin. Ab. title Devise, R. 4. pl. 3. p. 142. 1 P. Will. 345.



other hand, the burning or tearing may be partial and incomplete; yet, if this was done with the design of revoking the will, it will be as complete a revocation, as if the entire will had been destroyed. (1) The act, therefore, must be proved to have been done with the intention of revoking. And on a question of intention, as this is, evidence of the declarations of the testator at the time of doing the act, or of his subsequent declarations respecting the act, is clearly admissible, and has been admitted in a great variety of cases. (2)

By devise of  
freehold.

The several modes of revoking a will, hitherto mentioned, are those prescribed by the Statute of Frauds; and the language of that statute is so strong and clear, that it should seem absolutely to exclude every other species of revocation; for the legislature has declared, that no devise of lands shall be revocable otherwise than by the particular modes there specified, and that all devises shall continue in force until they are so revoked, notwithstanding any former usage to the contrary. However, strong as the words of the statute are, the doctrine of implied revocations of wills is established. (3) Among these, one kind of implied revocation is that resulting from the marriage of the testator and the birth of a child, without provision made for the objects of these relations; and this, as Lord Ellenborough said, in the case referred to, must now be considered as a general proposition of law. The doctrine of this implied or constructive revocation is founded, in the opinion of Lord Kenyon (4), on a tacit condition annexed to the will then made, that it should not take effect,

Implied revocation.

(1) Bibb dem. Mole v. Thomas, 2 Black. Rep. 1043. Burtenshaw v. Gilbert, Cowp. 49. 1 P. Will. 345. Doe dem. Perkes v. Perkes, 3 Barn. & Ald. 489.

(2) See particularly Burtenshaw v. Gilbert, Cowp. 53. Bibb dem. Mole v. Thomas, 2 Black. Rep. 1043. Campbell v. French, 3 Ves. 321. 2 East, Rep. 534. (b.)

(3) The origin and progress of this doctrine, and the various opinions of

Judges upon the subject, are very fully and ably considered in two late judgments, the one by Lord Ellenborough, in Kennebel v. Scafton, 2 East, 540., the other by Sir J. Nicholl, in Johnston v. Johnston, Dr. Phillimore's Rep. 1 vol. 468. And see Robert's Treatise on the Law of Wills, ch. 2. s. 17.

(4) Doe dem. Lancashire v. Lancashire, 5 T. R. 58. See also 2 East, 541. 4 Maule & Selw. 15.

By devisee of  
freehold.

if there should be a total change in the situation of the testator's family. Other Judges have been of opinion, that the doctrine is founded on a supposed intention in the testator (1); and it has been said to be only a presumption grounded on the supposition, that so complete a change in the family of the deceased raises the implication, that he did not intend his will to take effect.

On the subject of the admissibility of parol evidence, to rebut such an implied revocation, there has been considerable difference of opinion. Lord Mansfield and Mr. Justice Buller (2) were of opinion, that evidence of the testator's declarations, and other parol evidence, may be properly admitted; and such evidence is always admitted in the ecclesiastical courts. (3) On the other hand, strong opinions have been expressed against the admission of the testator's declarations (4); and in the last reported case (5), where the point arose, the Court of King's Bench cautiously abstained from expressing any opinion upon the subject. The admissibility of the testator's declarations may, perhaps, be found to depend principally upon this consideration:—whether the rule of law, which admits of such an implied revocation, is founded, as some have said, on a supposed intention in the mind of the testator; or whether, according to the opinion of others, the revocation is a tacit condition annexed to the will itself when first made. In the former way of considering the rule, there seems to be more reason for admitting such evidence, than in the latter view of the question; for, if there is a tacit condition annexed to the will at the time of the execution, then the revocation takes effect by operation of law, of which the law only can judge, and which must be collected from the circumstances that give birth to the presumption. (6)

(1) Lord Mansfield, in *Brady dem. Norris v. Cubitt*, 1 Doug. 39. Sir W. Wynne, in *Emmerson v. Boville*, Dr. Phillimore's Rep. 1 vol. 342. *Holloway v. Clarke*, ib. 359. *Johnston v. Johnston*, ib. 468.

(2) 1 H. Bl. 524.

(3) Dr. Phillimore's Rep. 1 vol. 469. 341. 344. 460

(4) By Lord Alvanley, *Gibbons v. Caunt*, 4 Ves. 848.

(5) *Kennebel v. Scafton*, 2 East, 543.

(6) See the judgment of Eyre C. J. in *Goodtitle dem. Holford v. Otway*, 2 H. Black. 524.

Secondly, of an action of ejectment by the devisee of a leasehold interest. By devisee of leasehold.

The claimant in this case will have to prove the execution of the lease by the lessor (1), under which lease the interest vested in the testator, the lessee; and, if the testator was an assignee of the original lessee, the assignment to him, as well as the original lease, must be proved. Lease.

The lease is the best evidence of the property being leasehold. But this may be dispensed with by proof of an admission to that effect by the defendant; as in the case of Doe, on the demise of Digby, v. Steel (2), where it was proved, that the Defendant had admitted, in his answer to a bill in equity, that the testator, under whom the lessor of the plaintiff claimed, was possessed of the leasehold premises there mentioned.

Since a lease for years is a chattel interest, and vests in the personal representative of the lessee, the claimant must produce the probate of the will, or give other legal evidence of the will having been proved in the Ecclesiastical Court, to which court alone the jurisdiction belongs (3); for a court of common law will not take notice of a will, as a title to personal property, till it is proved in the Ecclesiastical Court. (4) Probate.

The title of the testator, and the bequest to the claimant, being thus proved, all that remains to complete the claimant's title, is the executor's assent to the bequest. This previous assent is made necessary for the security of the executor, upon whom all personal property devolves, in trust to apply it, in the first instance, to the payment of debts; and, until his assent is given, the legatee has only an inchoate property, Assent of executor.

(1) See Vol. I. p. 462.

(2) 3 Campb. 115.

(5) See Vol. I. p. 342.

(4) Stone v. Forsyth, 2 Doug. 707.

By devisee of  
copyhold.

and cannot enter upon the premises without being guilty of a trespass. But as this assent to a legacy is only requisite for the security of the executor, and to complete the title of the legatee, there is no specific form prescribed for declaring the assent. In general, any expression or act done by the executor, which shows his concurrence or agreement to the bequest, will be sufficient (1); and "a very small matter shall amount to an assent to a legacy, an assent being but a right-ful act." (2) This assent, when once given, whether before probate or after, is evidence of assets, and an admission by the executor, that the fund is adequate to the discharge of debts; it vests the interest at law absolutely and irrevocably in the legatee (3), though he may still be liable to refund in a court of equity on the deficiency of other assets.

Ejectment by  
devisee of  
copyhold.

Thirdly, of an action of ejectment by a devisee of copyhold property.

Will.

The claimant, in the first place, has to prove the will. And it is now a clear proposition of law, whatever may be thought of the earliest decisions on the subject, that a devise of copyhold lands, or of a customary estate, passing by surrender, need not be signed by the testator as a devise of lands in fee-simple, unless such signature be required by the terms of the surrender to the use of the will; nor is the same form of revocation necessary. (4) The draft of a will, which the testator was prevented by sudden death from signing and publishing, has been held sufficient to direct the uses of a surrender (5); so also have instructions for a will, taken down in writing from words dictated by the testator. (6) In each of these cases, the draft of the will was shown to have been admitted to probate; but no stress seems to have been laid upon this circumstance.

(1) 3 Bac. Abr. 84. 4 Bac. Abr. 444. Toller's Law of Executor, 308.

(2) By the Lord Chancellor, in Noel v. Robinson, 1 Vern. 94.

(3) Doe, dem. Lord Say & Sele, v. Guy, 3 East, 120. 125.

(4) Doe, dem. Cook, v. Danvers, 7 East, 322. See Vol. I. p. 497.

(5) Carey v. Askew, 2 Brown, Ch. C. 319., and other cases cited in 7 East, 327.

(6) Doe, dem. Cook, v. Danvers, 7 East, 299. 324.

The claimant has also to prove the admittance of the testator to the copyhold tenement in question, and his own admittance (1); and before the late statute, st. 55 G. 3. c. 192., which makes every disposition of a copyhold by will as effectual without a surrender as with one, he must also have shown a surrender to the use of the will. A will, and a surrender to the use of the will, without an admittance, are not sufficient: until the admittance is made, the legal estate continues in the surrenderor, and descends to his heir. (1) A person taking a reversion or remainder by grant from the lord of the manor has a perfect title without admittance, and may take possession on the determination of the particular estate. (2) And though a party, who claims a copyhold as heir at law, may maintain an ejectment before admittance, against all persons except the lord, (for then he claims by the course and operation of law,) yet the rule is different in the case of one claiming under a surrender and a devise, who is a purchaser, and has nothing before admittance. The proof of an admittance, therefore, is indispensably necessary, in this case, to establish the testator's title, as well as that of the devisee; but the time of the admittance, whether before or after the devise, is immaterial as against the surrenderor and all persons except the lord, provided the surrender is before the demise in the declaration; for the surrender and admittance constitute one conveyance, and the admittance, whenever made, relates back to the surrender. (3) The surrender and admittance may be proved by the original entries regularly made on the court-rolls of the manor, or by copies of the court-rolls of the admittance and surrender properly stamped (4); and it is scarcely necessary to add, that there must be some evidence of the identity of the party admitted. (5)

By devisee of  
copyhold.

Admittance.

(1) Roe, dem. Jefferys, v. Hicks, 2 Wils. 15. Roe, dem. Shewen, v. Wroot, 5 East, 137. Wilson v. Weddell, Yelv. 144. Jefferys, v. Hicks, 2 Wils. 15. Doe, dem. Bennington, v. Hall, 16 East, 208. (2) Roe, dem. Cosh, v. Loveless, 2 Barn. & Ald. 453. (3) Holdfast, dem. Woollams, v. Clapham, 1 T. R. 600. (4) Doe, dem. Bennington, v. Hall, 16 East, 208. (5) Doe, dem. Hanson v. Smith, 1 Camb. 197. Roe, dem.

By guardian.

Where a surrender has been made to the use of A. for life, remainder to B., &c., an admittance of the tenant for life will operate as an admittance of those in remainder; for the several particular interests so created make only one entire estate. (1) For the same reason, if a copyholder of inheritance devise several interests, as an estate for life to A. with remainder to B., without having previously made a surrender, (which is not now necessary, in consequence of the provisions of the act of parliament before mentioned,) and the plaintiff in ejectment claim under B., proof of A.'s admittance will be sufficient, without proving also the admittance of B.

IV. Ejectment  
by guardian.

Fourthly, The next case, to be considered, is, the case of an action of ejectment by a guardian.

Guardian by  
socage.

Guardians in common socage, and guardians appointed by deed or will, may maintain an action of ejectment, to recover the property of their wards. A guardian in socage, (that is, the next friend of the heir at law of one, who has died seised of lands in common socage, to which next friend the inheritance cannot descend,) has the wardship of the land and of the heir, until his age of fourteen years. (2) A party, therefore, who claims as guardian in socage, will have to prove the seisin of the deceased, the fact of his leaving issue, his heir at law, under the age of fourteen years, and that among those relations, to whom the inheritance cannot descend, he himself is the next of blood to such issue. It seems necessary also to prove, that the ward was under the age of fourteen, at the time of the demise stated in the declaration (3); for Littleton expressly says, that the guardian

(1) *Auncelme v. Auncelme*, Cro. Jac. 31. *Warsopp v. Abell*, 5 Mod. 306.

(2) Litt. sect. 123.

(3) In the case of *Doe, dem. Rigge, v. Bell*, 5 T. R. 471., where it was proved at the trial, that two daughters, to whom the plaintiff claimed as guardian in socage, were above fourteen, an objection was taken on this

ground against the plaintiff's recovering. Another objection was also taken, on the ground of the insufficiency of a notice to quit. The plaintiff was nonsuited. On cause being shown against the nonsuit, the Court of K. B. discharged the rule, on the ground that the notice was insufficient; and there was no argument on the other point.

shall have wardship of the land until the age of fourteen years, and when the heir comes to the age of fourteen years complete, he may enter and oust the guardian, and occupy the land himself; however, in the opinion of others, this guardianship ends on the completion of the age of fourteen years, only where another guardian, either by the election of the infant or otherwise, is ready to succeed, and, in the mean time, the guardianship in socage will continue. (1)

By tenant by  
elegit.

With respect to the other description of guardian, a statute in the reign of Charles II. (2) gives a power to fathers to appoint guardians for their unmarried children under age, "either by deed executed in their lifetime, or by last will and testament in writing, in the presence of two or more credible witnesses;" and enacts, that such appointment shall be effectual against every claim of guardianship in socage, and that the guardian so appointed may take into his custody the profits of all the lands and hereditaments of the children till their respective age of one-and-twenty years. To support an ejectment, therefore, brought by such guardian, the title of the deceased father must be proved, the minority of the ward at the time of the demise in the declaration, and the due execution of the will or deed, which appoints him guardian. The natural father of an illegitimate child cannot appoint a guardian (3); consequently, the title of the lessor of the plaintiff would be disproved, by proof of the illegitimacy of the child.

Guardian by  
deed or will.

Fifthly, of the action of ejectment by a person claiming land under an execution. And, first, of an ejectment by the tenant under a writ of elegit.

V. Ejectment  
by tenant by  
elegit.

The writ of elegit, as is well known, is founded on the statute of Westminster the second (4), (the first statute that subjected land to the execution of a judgment or recognizance,)

(1) Andr. 313.

(2) St. 12 C. 2. c. 24. s. 8, 9.

(3) *Horner v. Liddard*, by Sir W. Scott. Printed Report, p. 179.

(4) St. 13 Ed. 1. c. 18

By tenant by elegit.

which gives to the creditor, who has sued for the debt or damages and recovered a judgment, his election, either to have a writ to the sheriff for levying the debt of the lands and chattels, or that the sheriff deliver to him the chattels of the debtor and a moiety of his land. The sheriff, upon receiving this writ, is to impanel a jury, who are to enquire of the debtor's goods and chattels, and also of his lands and tenements. Formerly it was usual for the sheriff, after inquisition made by the jury, to deliver actual possession of a moiety of the lands; but, by the modern practice, he delivers only legal possession, and the creditor, as some have said, in order to obtain actual possession, must proceed by ejectment. (1) \*

In this action of ejectment, it will be necessary for the lessor of the plaintiff to prove the judgment recovered by him, the elegit taken out upon it, the inquisition, and the sheriff's return, by which the land in question is assigned to him. (2) For this purpose, an examined copy of the judgment roll, containing the award of the elegit and the return of the inquisition, is sufficient proof, and a copy of the elegit itself or of

(1) 2 Fidd. Pr. 1075. 3 T. R. 295. (2) Bull. N. P. 104.  
2 Eq. Ca. Ab. 381.

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\* In the case of *Rogers v. Pitcher*, 6 Taunt. 207., the Lord Chief Justice Gibbs alluding to this opinion, expressed himself thus: "I am aware, it has in several places been said, that the tenant in elegit cannot obtain possession without an ejectment, but I have always been of a different opinion. There is no case in which a party may maintain ejectment, in which he cannot enter. The ejectment supposes that he has entered; at least, that he has leased to another, and that the other entered; and that the lessor may do it by another, and not enter himself, is not very intelligible. I would not however consider the present case as deciding these points, which I only throw out in answer to the argument that has been used." In another part of his judgment the Ch. Justice says, "I have no doubt, that the sheriff may deliver the moiety, and enter upon it; except that where the land is under a previous demise, as in this case it is to the plaintiff, whatever elder term the sheriff finds, he cannot disturb the previous title of the tenant in possession: all he can do, is to put the avowant into the state of landlord: if the land had been in the possession of the former owner, the sheriff might have delivered actual possession: where it is in the possession of a tenant, the sheriff sets it out by metes and bounds, and the tenant is bound thenceforward to pay rent for his moiety to the tenant by elegit."



the inquisition will not be wanted (1); for, as Lord Ellenborough said in the case referred to, the judgment roll imports incontrovertible verity as to all the proceedings, which it sets forth. \* This evidence is sufficient in an action against the debtor, who is in possession of the lands. If a third person, and not the debtor, is in possession, it will be incumbent on the lessor of the plaintiff not only to prove his own title under the judgment, but also the title of the debtor, under whom he claims. The sheriff must state, in his return, that he has set out a moiety by metes and bounds, otherwise the return will be void (2); and the objection may be taken on the trial of the action of ejectment. (3).

By conusee of  
stat. merchant.

Of a nature similar to the case last mentioned, is an ejectment by the conusee of a statute merchant (4), statute staple (5), or recognizance in the nature of a statute staple (6); all of which are obligations, acknowledged before certain persons appointed for the purpose, and enrolled in courts of record. (7) The process on a statute merchant, after it has been forfeited and certified into Chancery, is a writ of *capias si laicus*; and if the sheriff return upon the writ, that the party is dead or not found in his bailiwick, a writ of extent issues to extend the lands to the conusee on a reasonable extent, without the delay or charge of a writ of *liberate*. (8) The writ of extent recites the writ of *capias si laicus*, and the sheriff's re-

Ejectment by  
conusee of  
stat. merchant.

(1) *Ramsbottom v. Buckharst*, 2 Maule & Selw. 565.

(2) *Pullen v. Birkbeck*, Carth. 453. *Fenny, dem. Masters, v. Durrant*, 1 Barn. & Ald. 40.

(3) 2 Doug. 475.

(4) By st. 11 Ed. 1. enforced and amended by st. 13 Ed. 1. st. 3.

(5) By st. 27 Ed. 3. c. 9.

(6) By st. 23 H. 8. c. 6.

(7) On the subject of these securities, see Bac. Ab. tit. Execution; and 2 Saunders, 69. c. in note, and Tidd. Pr. 1101.

(8) 2 Tidd. Pr. 1083.

\* In an action of ejectment, to recover lands taken in execution under a writ of *feri facias* on a judgment obtained against a termor, the judgment must be proved; and it will not be sufficient to prove the writ of *feri facias* without the judgment, though the lessor of the plaintiff is the party in the original action, in which the execution issues. (a)

(a) *Doe, dem. Bland, v. Smith*, Holt, N. P. C. 589.

By conusee of  
stat. merchant.

turn, and then proceeds to command the sheriff to cause to be delivered to the conusee the goods and chattels of the debtor, and all his lands and tenements, "of which he was seised on the day of acknowledging the debt or ever afterwards, unless they have descended to any one within age by hereditary descent." (1) In an action of ejectment, therefore, by the conusee of a statute merchant against the conusor, the proper evidence will be, first, the obligation of the conusor, or, in case the obligation has been lost or damaged, a true copy from the roll in the custody of the clerk of recognizances or of his deputy, made and signed by the clerk or his deputy, and duly proved \* (2); and, in the next place, the writ of extent must be proved. An examined copy of the writ of *capias si laicus* appears not to be necessary, since it is recited in the writ of extent. If the ejectment is not against the debtor, but against a third person, who is in possession of the lands, and who was in possession before the conusor's acknowledgment of the debt, the lessor of the plaintiff, in addition to the proofs before mentioned, must be prepared with proof of the conusor's

(1) Tidd, Appendix, ch. 39. s. 105.

(2) St. 8 G. 1. c. 25. s. 2.

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\* By st. 27 Eliz. c. 4. s. 7. the whole tenor and contents of all statutes merchant and of statutes of the staple are to be entered, within six months after the acknowledgment, in the office of the clerk of recognizances taken according to the st. 23 H. 8. c. 6., and shown to the clerk, who is to enter the statutes in a book provided for the purpose. And by the 8th section of the same act, if the statute merchant or statute staple is not delivered to the clerk or his deputy, within four months after the acknowledgment, that a true copy may be taken by the clerk, in such case every statute, not so entered, will be void against any person who purchases the lands and tenements, or any profit out of them, after the time of the acknowledgment. The 9th section requires the clerk, under a penalty for disobedience, to enter the recognizance within six months after the acknowledgment, and to indorse the day and year of the entry upon the statute, with his name.

By the statute of Frauds, (st. 29 C. 2. c. 3. s. 18.) the day and year of the enrolment of recognizances are required to be set down on the margin of the roll, and no recognizance will bind lands, &c., in the hands of a purchaser *bonâ fide* and for valuable consideration, but from the time of such enrolment.

The statute of 27 Eliz. c. 4. s. 7, 8. does not extend to recognizances under st. 23 H. 8. c. 6. (called recognizances in the nature of statutes staple,) and the st. 8 G. 1. c. 25. s. 1. was passed to regulate the mode of enrolling and preserving them.

title ; or, if the defendant claim under the conusor, as lessee or otherwise, that his interest and right of possession have been regularly determined. By conusee of  
stat. staple.

The process on a statute staple, or on a recognizance in the nature of a statute staple, is a writ in the nature of an extent (1), commanding the sheriff to take the body, lands, and goods of the debtor, and, after causing the lands and goods to be extended and appraised, to take them into the king's hands. The conusee then, in order to get possession of the lands, must sue out a *liberate* (2), which recites the last writ and the sheriff's return, and commands the sheriff to deliver to the conusee the lands, tenements, and chattels, so taken into the king's hands by the extent and appraisement, to hold them, till he is satisfied of his debt. Upon this writ, the sheriff cannot turn the tenant out of possession, as upon an *habere facias possessionem*, but is only to deliver the legal possession, as upon an *elegit*, and, in order to obtain the actual possession, the conusee must proceed by ejectment. (3) In such an action against the debtor, the plaintiff's evidence will consist, in the first place, of the bond of the conusor, to be proved in the regular manner ; or, in case of its loss or damage, a true copy from the roll in the custody of the clerk of recognizances or his deputy, made and signed by the clerk or his deputy, and duly proved, will have precisely the same effect, as if the original recognizance were produced. (4) After proof of the recognizance, the writ of *liberate* is to be proved ; but the proof of the writ of *extent* seems not to be necessary, as this writ is recited in the *liberate*. If the action is against a third person in possession of the lands, not against the debtor himself, other evidence will also be required, as in the case of an ejectment against a third person by the conusee of a statute merchant. (5) Ejectment by  
conusee of  
stat. staple,  
&c.

(1) See Tidd. Appx. ch. 39. s. 107. Tidd. Pr. 1084.

(2) Tidd. Appx. ch. 39. s. 108.

(3) 1 Vent. 41. Tidd. Pr. 1084.

(4) St. 8 G. 1. c. 25. s. 2.

(5) See ante, p. 264.

By mortgagee. Sixthly, of an ejectment by a mortgagee.

**VI. Ejectment  
by mortgagee.**

Where a term of years is granted by way of mortgage, with condition to be void on repayment of the mortgage money at a time appointed, the mortgagee has an immediate vested interest and may immediately enter on the lands, liable only to be dispossessed on the performance of the condition of repayment. In such a case, the demise in the declaration will be properly laid at any time subsequent to the commencement of the term. But if a clause is inserted in the mortgage deed, as is now most usual, that the mortgagor shall continue in possession, until default is made in payment of the mortgage money, then the demise ought to be laid subsequent to the time appointed for the payment. In either case it will not be incumbent on the plaintiff to prove the defendant's default by non-performance of the condition; but the defendant, if he can, is to prove performance.

**Proof of mortgage deed and possession.**

If the lessor of the plaintiff claim the premises as mortgagee, against the mortgagor, the plaintiff will have to prove the execution of the mortgage deed (1), and the defendant's possession of the mortgaged premises. When the ejectment is brought against a third person, who is in possession, the plaintiff must prove a legal title to divest the defendant of his possession; as, in case the defendant claims under the mortgagor by a lease or other title *prior* to the mortgage, by showing the expiration or legal determination of the defendant's estate, which is prior to his own: or, if the defendant was let into possession under a lease granted by the mortgagor *after* the mortgage, by showing that the defendant's interest was created subsequent to his own under the mortgage deed, in which case the defendant will not be entitled to a notice to quit, unless the mortgagee has done some act to recognise the defendant as his tenant. (2)

(1) See Vol. I. p. 462., as to the execution of deeds.

(2) *Thunder, dem. Weaver, v. Belcher*, 3 East, 449.

Seventhly, of the action of ejectment by a parson, for re- By parson.  
covering possession of the parsonage-house or glebe.

When the lessor of the plaintiff grounds his right to recover on being parson, he ought to prove himself in the full and complete possession of the rights of the church : and this is done, in ordinary cases, by proof of presentation, institution, and induction ; or when the ordinary is also the patron, (in which case the presentation and institution are one and the same act,) by proof of collation and induction. VII. Ejectment by parson.

Presentation, which is the act of the patron offering his clerk to the bishop of the diocese for institution, may be by parol, or by writing in the nature of a letter to the bishop. (1)\* And as a presentation may be by parol, it may be proved by parol, by a witness who was present and heard it. (2) If the presentation is by a corporation aggregate, it must be in writing under their common seal. (3) Presentation.

Institution is described by Sir William Blackstone (4) to be the investiture of the spiritual part of the diocese. It is the act of the bishop, appointing the presentee to be the rector of the church, *cum curâ animarum*. By institution, therefore, the church is full against a common person. This ceremony of institution may be proved by the letters testimonial of in- Institution.

(1) Co. Litt. 130. a. That it may be by parol, see also Bull. N. P. 105. 253. Eriswell, 3 T. R. 723., and Vol. I. p. 253.

295. and 3 T. R. 723. (3) Gibs. Cod. tit. 34. ch. 8. p. 794.

(2) See the case of *The King v.* (4) 1 Com. 591.

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\* Dr. Burn has laid down, in his work on Ecclesiastical Law, (title, *Benefice*, under the head of *Presentation*, art. 19. p. 149.) that, by the statute of frauds, all presentations must be in writing ; and that the necessity of a written presentation is implied by the stamp acts. But what clause there is in the statute of frauds, on the subject of presentations, Dr. Burn has not pointed out : and the utmost that can be inferred from the stamp acts is, that, if the presentation is in writing, it requires a stamp, and a written presentation unstamped is inadmissible. Lord Kenyon and Mr. Justice Buller have expressly held, in the passages above cited, that a presentation may be by parol.

By parson. stitution; or by the official entry in the public register of the diocese, which ought regularly to record the time of the institution, and on whose presentation it was given. (1) This entry, therefore, if regularly made, is proof of the presentation, as well as of the institution.

Induction. Although the clerk may, upon institution, enter on the parsonage-house and glebe, yet he cannot maintain an action for them, until he is inducted. By induction the clerk becomes seised of the temporalities of the church, and is in complete possession. (2) It is an act purely of a temporal nature; performed under a mandate, directed by the ordinary to the archdeacon; or, if the church is exempt from the archdeacon's jurisdiction, directed to the chancellor or commissary; or, if the church is a peculiar, exempt from episcopal jurisdiction, then to the dean or judge within the peculiar. (3) After induction, according to the tenor and language of the mandate, the inductor ought to certify the giving of the induction, either by a distinct instrument, in the form of a return made to the mandate, or by indorsement on the mandate. The fact of induction may therefore be proved, either by some person present at the ceremony, or by the indorsement on the mandate, or by the return to the mandate, if any return has been made.

Taking of oaths.

Before institution, certain oaths are required to be taken by the person presented, such as the oath of supremacy and allegiance; and, within a certain time after institution or collation, he is required to declare his assent to the use of all things contained in the Book of Common Prayer, in the manner prescribed by the act of uniformity (st. 13, 14 C. 2. s. 6.); and this he is required to do, under the penalty of being *ipso facto* deprived of his benefice in case of neglect or refusal. But it has been determined, upon the soundest principles of law, that he is not obliged to prove, in support

(1) Gibs. Cod. tit. 34. ch. 8. p. 815.

(2) Gibs. Cod. tit. 34. ch. 9. p. 814.

(3) Gibs. Cod. tit. 34. ch. 9. p. 815.

of his title, on the trial of the cause, his conformity with these requisites; his conformity will be presumed. (1) And though the statute of Charles enacts, that the minister, who so refuses or neglects, shall be *ipso facto* deprived, and that the patron may present to the benefice, as if such minister were dead; yet, no case appears to have determined this point, that the proof of the negative on the opposite side will be a good defence to the action; in other words, that the mere proof of the defendant's neglect to declare his assent, shall be of itself a bar, in the action of ejectment, to one who by institution was invested with the *spiritual* rights, and by induction was actually seized of all the *temporal* rights of the church.\*

By parson.

In addition to the proof of title, grounded on presentation, institution, and induction, some evidence will be requisite to show, that the house or land, for the recovery of which the action is brought, is the property of the church. This may be shown, by proof of the receipt of rent from some former occupier, or by proof of the occupation of the premises by some former incumbent, by the production of ancient leases, and in various other modes.

Premises. —  
Church property.

Before closing the subject of ejectment, it may be convenient to mention, in this place, a few cases respecting the competency of witnesses. And first, a witness, to whom the lessor of the plaintiff has agreed to grant a lease of the lands

Witnesses.

(1) Case of Dr. Sherard, afterwards Lord Harborough, before Wil-  
mot C. J., cited by De Grey C. J., 3 Wilson, 366. 2 Black. Rep. 853.  
Powell v. Milburne, 3 Wilson, 355.  
S. P. 2 Black. Rep. 851. S. C., and  
other cases cited in Vol. I. p. 196.

\* In Mr. Justice Blackstone's report of the case of Powell v. Milburne, Lord Chief Justice De Grey is reported to have said, "If evidence had been given, that a person had regularly attended the church, and heard nothing of this matter (that is, the declaration of assent); or if a search had been made in the bishop's register, and nothing had been found therein, this would have destroyed the presumption, and put the plaintiff on proof of his having performed those requisites." But this opinion is not so strongly expressed in Wilson's report, which is fuller and better than the other report.

Trespass for mesne profits.

in question, in case he recover them in the action of ejectment, is clearly incompetent to give evidence against the defendant. The tenant in possession also is an incompetent witness in support of the title of the defendant, under whom he holds (1); and where a *prima facie* case has been made out against the defendant, as tenant in possession, a witness is incompetent to prove himself the real tenant, and that the defendant was only his bailiff. (2) Where both parties claim as lessees under the owner of the property, and the only question is, whether he demised first to the plaintiff or to the defendant, he is not competent to prove either lease. "If two parties are contending for the possession, who are to pay rents in different rights, the landlord cannot be admitted a witness in the ejectment." (3)

## VIII. Trespass for mesne profits.

Eightly, and lastly, of the action of trespass for mesne profits.\*

(1) See Vol. I. p. 59.

(2) Doe, dem. Jones, v. Wilde,  
5 Taunt. 183., stated in Vol. I. p. 65.

Doe, dem. Lewis, v. Bingham, 4 Barn.  
& Ald. 672. S. P.

(3) By Buller J. in Bell v. Harwood, 5 T. R. 310.

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\* The stat. 1 G. 4. c. 87. s. 2., enacts, that whenever it shall appear, on the trial of an ejectment, at the suit of a landlord against a tenant, that the tenant or his attorney has been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease entry and ouster; but the production of the consent, rule, and undertaking of the defendant, shall in all such cases be sufficient evidence of lease entry and ouster; and the Judge, before whom the cause is tried, shall permit the plaintiff, (whether the defendant shall appear upon such trial or not,) after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits, from the day of the expiration or determination of the tenant's interest, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial, finding for the plaintiff, shall, in such case, give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be found for the mesne profits: provided, that this shall not be construed to bar any landlord from bringing an action of trespass for the mesne profits, which shall accrue from the verdict, or the day therein specified, down to the day of the delivery of possession of the premises recovered in the ejectment.



As the principal question in the action of ejectment relates to the title, and the damages recovered are merely nominal, an action of trespass is often brought after a recovery in ejectment, in order to recover the mesne profits, which the tenant in possession has wrongfully received. And this action may be brought against the tenant in possession, either in the name of the nominal plaintiff in ejectment, or in the name of his lessor\*; in either case, it is in reality the action of the lessor of the plaintiff. The plaintiff in this case will have to prove his possession of the premises, the defendant's wrongful entry, the time of the defendant's occupation, and the value of the mesne profits to be estimated by the amount of the crops taken, or by the fair annual value of the premises. He may recover also, in this action, the costs of executing the writ of possession, and the costs also of the ejectment, if not already recovered.

Trespass for  
mesne profits.

The proceedings in ejectment, when they are admissible in evidence, are of the greatest use, not only as proving the plaintiff's possession and the defendant's wrongful entry, but also because they estop the parties from controverting the plaintiff's title. It will be necessary therefore to consider shortly the effect of a judgment in ejectment.

The judgment in an action of ejectment between the nominal plaintiff and the tenant in possession, or between the lessor of the nominal plaintiff and the tenant in possession, is conclusive, in the action of trespass between these parties, on the right of possession at the time of the demise laid in the declaration. (1) And a judgment by default against the casual ejector is as conclusive, in an action of trespass brought by the nominal plaintiff or his lessor, against the tenant in

Judgment in  
ejectment.

(1) *Aslin v. Parkin*, 2 Burr. 668.

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\* If the action is brought in the name of the nominal plaintiff, damages are not to be recovered for any possession anterior to the day of demise in the ejectment; the nominal plaintiff not having a title before that time.

Trespass for  
mesne profits.

possession; for there is no solid distinction between a judgment in ejectment upon a verdict, and a judgment by default: in the first case, the right is tried and determined, in the latter it is confessed; in both cases the lessor of the plaintiff and the tenant in possession are judicially considered the only parties to the suit. (1) The judgment in ejectment is to be proved in the regular manner, by an examined copy.

The judgment in an action of ejectment on the several demises of two or more persons, is evidence for them in an action of trespass brought by them jointly (2); for the judgment is consistent with their being tenants in common, and, in respect of such tenancy, they may jointly maintain trespass. A judgment in ejectment is not evidence against a precedent occupier (3); nor is a judgment in an action of ejectment against a woman evidence in an action for mesne profits against her and her husband (4); for the parties are not the same, and the recovery in ejectment operates as an estoppel only between the same parties. So, if the action for mesne profits is brought against the landlord of the premises, a judgment in ejectment against the casual ejector is not evidence of title, unless the landlord had notice of the ejectment. Thus, in the case of *Hunter v. Britts* (5), where the defendant, who was the landlord of the premises, was proved to have been in the receipt of the rents and profits from the time of the demise till the execution of the writ of possession; but the ejectment had been served upon the tenant, and the defendant did not appear to have had notice of this until after the judgment: Lord Ellenborough held, that the judgment was not evidence against the defendant, without notice of the ejectment; but the defendant in this case having promised, subsequently to the judgment, to pay the rent and costs to the plaintiff, Lord Ellenborough was of opinion, that this subsequent promise amounted to an

(1) *Aslin v. Parkin*, 2 Burr. 668.

(2) *Chamier and Plestow v. Clingo* 112.  
and *Willet*, 5 Maule & Selw. 64.

(3) *Bull. N. P.* 87.

(4) *Denn v. White and wife*, 7 T. R.

(5) 3 Campb. 455.

admission, that the plaintiff was entitled to the possession of the premises, and that he himself was a trespasser. Trespass for mesne profits.

This judgment, like all others, is conclusive only as to the subject-matter. It is conclusive, on the question of title, only from the day of the demise laid in the declaration in ejectment. It is not evidence of title before that time; and if the plaintiff seeks to recover damages for a wrongful possession antecedent to the day of demise, he must prove his earlier title, which the defendant will be at liberty to controvert. (1) Effect of judgment.

The action of trespass is a possessory action, founded on an injury to the possession; and proof of an actual possession by the plaintiff will therefore be necessary, to support the action for mesne profits. To prove this, an examined copy of the writ of possession, and of the sheriff's return, are usually given in evidence; and an entry under the writ of possession will be referred to the time when the title accrues. This evidence is necessary, where the judgment in ejectment has been by default against the actual ejector. Possession of plaintiff.

But where the judgment is after verdict, and the ejectment was against the tenant in possession, who appeared and confessed lease, entry, and ouster, the plaintiff's possession seems to be sufficiently shown by proof of the common consent-rule, without proving the execution of the writ of possession; because, by entering into the rule to confess, the defendant is estopped both as to the lessor and lessee; so that either may maintain trespass without proving an actual entry; but where the judgment was against the casual ejector, and no rule entered into, the lessor, says Mr. Justice Buller, shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed. (2) If the plaintiff has been let into possession with the consent of the

(1) Bull. N. P. 87.

(2) Bull. N. P. 87. citing Thorpe v. Fry. And see cases cited in 2 Selw.

N. P. 693. S. P.

Trespass for  
mesne profits.

defendant, this is sufficient to entitle him to maintain the action for mesne profits, though no writ of possession has been executed. (1)

Costs in  
ejectment.

The costs of the ejectment, where the plaintiff suffers judgment by default, may be recovered in this action, under that part of the declaration, in which the plaintiff complains of having been obliged to expend money in recovering possession of the premises. The defendant, under the general issue, will not be allowed to prove an agreement on the part of the plaintiff to waive these costs, in consideration of the defendant paying the rent of the premises for the time in dispute. (2)

(1) *Calvert v. Horsfall*, 4 Esp. N. P. C. 167.

(2) *Doe dem. Hill v. Lee*, 4 Taunt. 459.

## PART II.

### OF EVIDENCE IN ACTIONS, CONSIDERED WITH REFERENCE TO THE OFFICE OR CHARACTER OF THE PARTIES.

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**I**N the former part of this volume, the several actions, of which it was proposed to treat, have been considered, with reference to the nature of the injury complained of; it now remains to enquire into the requisite evidence in certain actions, with reference to the particular relation or character of the parties to the suit.

The most important actions, considered in this point of view, are those against sheriffs, against justices of the peace, constables, and officers of the excise or customs. The evidence, requisite in support of these actions, will be first enquired into; and afterwards we may proceed to treat of the evidence in actions brought by assignees of bankrupt, or by executors and administrators.

#### CHAP. I.

##### *Of Evidence in Actions against Sheriffs.*

**T**HE order, in which it is proposed to treat of this class of actions, is; first, to consider the action for taking the plaintiff's goods in execution; secondly, the action for not arresting a debtor; thirdly, the action for taking insufficient pledges; fourthly, the action to recover money levied; fifthly, the action for taking the goods of a tenant in execution, with-

For taking  
goods in  
execution.

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out paying the arrears of rent; sixthly, the action for an escape on mesne process; seventhly, the action for an escape in execution; eighthly, the action for an extortion of the bailiff; ninthly and lastly, the action for a false return.

I. For taking  
the plaintiff's  
goods in exe-  
cution.

First, of an action against the sheriff for taking the plaintiff's goods in execution.

One of the most common actions against the sheriff is, an action of trespass for the seizure of the plaintiff's goods under an execution issued against a third person. The object of this action is to make the sheriff responsible for the act of another, who is supposed to have acted under his authority: for it is an established rule, that the sheriff is answerable for the taking by the bailiff, who seizes under the colour of a warrant; the act of the bailiff being considered, for all civil purposes, the act of the sheriff himself. (1)

The points, to be proved in this action, are, the plaintiff's property in the goods, the taking by the defendant, and the connection or relation between the defendant and the bailiff in the particular transaction, which is the subject of the action. With respect to the fact of taking, and the proof of the plaintiff's property, it is scarcely necessary to say any thing. It may be sufficient to mention, that if the plaintiff claim the goods, as his property, under an assignment, or bill of sale, or other writing, the written instrument must be proved according to the regular course. In answer to this, the defendant may show, that the assignment, or bill of sale, was fraudulent; and for the purpose of proving the fraud, the declarations of the vendor at the time of his signing and executing the instrument, are admissible in evidence, as a part of the transaction, against the plaintiff, who

(1) *Sanderson v. Baker*, 2 Black. 832. *S. C.* 3 Wils. 317. *Cameron v. Reynolds*, Cowp. 403. *Ackworth v. Kempe*, 1 Doug. 40. And several other cases to the same effect are cited in 2 Black. Rep. 833, 834.

claims under the vendor; but declarations made by him at any other time cannot be received. (1)

For taking  
goods in  
execution.

The last point, namely, the connection between the sheriff and the bailiff, is the principal, and the only point, which in this place requires any discussion. The fact, of the sheriff having authorized the bailiff to take the execution, is best proved by the warrant itself, usually kept in the custody of the officer: if the officer has returned it to the sheriff's office, a notice to produce it should be regularly served (2); and, on proof of this notice, secondary evidence of the warrant will be admitted. The bailiff usually returns the warrant, if not executed, to the sheriff's office, but if he has executed it, he keeps it for his own justification, and returns to the sheriff a memorandum of what he has done under the warrant, from which memorandum the sheriff makes his return. (3) After the execution of a warrant, therefore, a notice to produce the warrant should be served on the bailiff; for the plaintiff will not be entitled to give parol evidence of the warrant, on proving a notice only to the sheriff. (4)

Proof of  
warrant.

Further, a written paper purporting to be a copy of the warrant of execution, and delivered as such by the officer at the time of the seizure, is not sufficient to charge the defendant: this is nothing more in effect, than an admission by the bailiff, that he was acting under the warrant of the defendant; but the bailiff is not the sheriff's general officer, as the under-sheriff is, and any statement made by him, as to his acting under the authority of his superior, is not admissible evidence against the sheriff: the warrant itself ought to be produced, as the best proof of the authority. (5) Nor is the bond of indemnity, which the bailiff gives to the sheriff, any proof of his acting under the authority of the sheriff on a particular

(1) *Phillips v. Eamer*, 1 Esp. N. P. C. 357. *Penn v. Scholey*, 5 Esp. N. P. C. 243. (3) *Martin v. Bell*, 1 Starkie, N. P. C. 415.

(2) As to the notice to produce, the service of such notice, and the proof of the notice, see Vol. I. p. 442. (4) *Ibid.* (5) *Drake v. Sykes*, 7 T. R. 115. 116.

For taking  
goods in  
execution.

occasion; for he is not the sheriff's general officer; but he gives a bond to execute such warrants as shall be directed to him; and, when he receives a warrant, he becomes the sheriff's special officer. (1)

Recognition  
by sheriff.

Instead of proving the warrant, if it can be shown, that the sheriff has recognised the bailiff, who executed the writ, as the officer, whom he had entrusted with the execution, such a recognition is evidence of the bailiff's acting under his authority, without the production of the warrant. (2) Thus, where a paper was produced from the sheriff's office, containing as well an order to the officer, to give the necessary instructions for making a return to the writ in question, as also his return; this was held to be a clear recognition by the sheriff, of his having authorised the officer to execute the writ. (3) So, in the late case of *Martin v. Bell* (4), an action against the sheriff for the extortion of a bailiff in taking bail, in which case a notice was proved to have been served on the sheriff, calling upon him to produce the bail bonds, which had been executed and delivered to the bailiff, and it was further proved, that one of these bonds had been returned to the sheriff, upon which he had made his return of *cepi corpus*; Lord Ellenborough held, that this evidence was sufficient to prove the bailiff's agency; the sheriff having, by his return on the bail bond, taken the fruits of the arrest by the bailiff, which he could not do without also adopting his act. (5)

Indorsement,

To connect the sheriff with the acts of a particular officer in the execution of a writ, it will not be sufficient to produce an examined copy of the writ and return, with proof that the

(1) *Drake v. Sykes*, 7 T. R. 113. in all the business of the office. See also *Jones v. Wood*, 5 Campb. 228.

(2) *Sanderson v. Baker*, 2 Black. 832., in which case the recognition, such as it was, of the act done, was by the under-sheriff; and that was considered equivalent to a recognition by the sheriff himself. The under-sheriff is the general officer of the high sheriff, and represents him

(3) *Jones v. Wood*, 3 Campb. 228.

(4) *Martin v. Bell*, 1 Starkie, N. P. C. 416.

(5) That an adoption of the agency in one part operates, as an adoption of the whole act, see *Wilson v. Poulter*, 2 Str. 859. *Hovil v. Park*, 7 East, 164.



name indorsed is the name of the sheriff's officer, although it should appear to be the usual practice in the sheriff's office to indorse upon the writ, before it issues, the name of the officer who is to execute the warrant (1): however, if it were proved, that the bailiff's name had been indorsed on the writ, before it issued, by the under-sheriff, or some person authorised by him, that would probably be considered as sufficient evidence to connect the sheriff and the officer.

For taking  
goods in  
execution.

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A question has sometimes occurred with respect to the admissibility of statements and admissions by the under-sheriff, or by the sheriff's officer, as evidence against the sheriff. As to admissions by the under-sheriff, the earliest case, usually referred to, is that of *Yabsley v. Doble* (2), of which the note is as follows: "The question was, if the confession of an under-sheriff, of an escape, be any evidence against the high-sheriff; and adjudged that it is: for, though the sheriff is suable, yet the under-sheriff gives him a bond to save him harmless, and therefore it will all fall upon him: and his confession therefore is good evidence, because in effect it charges himself." This is the whole of the note in the report; in which, it may be observed, many important particulars are entirely omitted; nothing is stated with regard to the circumstances, under which the admission was made, or what is more material, as to the time or date of the admission. The report of the case is expressed in such general and broad terms, as to warrant the position, that an admission by the under-sheriff at any period, as to the subject-matter of the suit, is evidence against the sheriff. Some observations were made on this case, in *Drake v. Sykes* (3), where the question was, Whether a writ-

Admission by  
under-sheriff.

(1) *Jones v. Wood*, 5 Campb. 329. by Ld. Ellenborough. *Martin v. Bell*, 1 Stark. N.P.C. 413, by Ld. Ellenborough. *Hill v. Sheriff of Middlesex*, Holt, N.P.C. 217., by Gibbs C. J. The plaintiff, not having other proof against the sheriff, was nonsuited; and the nonsuit was affirmed by the Court of C. P.; 7 Taunt. 8. *Morgan v. Brydges*, 2 Starkie, N.P.C. 314., S. P., ruled by Lord Ch. J. Abbott. This kind of evidence seems to have

passed in *Blatch v. Archer*, Cowp. 63, and *M'Neil v. Perchard*, 1 Esp. N.P.C. 265.; and in the latter case of *Tealby v. Gascoigne*, 2 Stark. N.P.C. 202., before Richards C. B. But the former set of cases, particularly the case of *Hill v. Sheriff of Middlesex*, in which the point came before the Court of Common Pleas, has fixed the rule.

(2) 1 Lord Raym. 190.

(3) 7 T. R. 117.

For taking  
goods in  
execution.

ten paper, which had been delivered by the bailiff at the time of the execution, as a copy of the sheriff's warrant, could be admitted in evidence against the sheriff, no notice having been given to produce the original warrant; and, in that case, Mr. Justice Lawrence expressed himself in the following terms: "The case in *Lord Raymond* seems to have proceeded on the ground of the indemnity given by the under-sheriff, by virtue of which his confession was in effect received against himself; and the same argument would also apply to the bailiff. But I do not feel the strength of that argument; it does not follow, that because he charges himself, the sheriff has a remedy over; for perhaps the sheriff may suffer much beyond the extent of the indemnity. The admission of the under-sheriff may affect the high-sheriff, because he is the general officer of the sheriff; but I do not think, that the bailiff is his general officer." And Lord Kenyon takes the same view of the case, considering the under-sheriff as the general agent, or servant of the sheriff, appointed by him to execute his office. Now, the admission of a general agent, concerning the business entrusted to him, has, in several cases, been allowed to be equivalent to the acknowledgment of the principal (1): and upon this principle, which considers the under-sheriff as a general agent identified with the sheriff, an adoption and recognition by the former, as to the acts of the bailiff, has been considered as equivalent to a recognition by the sheriff himself. (2)

Admission by  
bailiff.

The bailiff stands in a different relation towards the sheriff: he is not, like the under-sheriff, the general deputy of the high-sheriff for all official purposes: he gives a bond to execute such warrants, as shall be directed to him; and when a warrant is granted, he becomes the special officer of the sheriff. (3) The admissions, therefore, of a bailiff will not

(1) *Burt v. Palmer*, 5 Esp. N.P.C. 145. *Palethorp v. Furnish*, 2 Esp. 511. n. See Vol. I. Part I. ch. 5. s. 4.

(2) *Sanderson v. Baker*, 2 Blackst. 834. It is a general rule, that an

employer, who adopts the acts of his agent for a moment, is bound by them; see *Ward v. Evans*, 2 Salk. 442.; *Smith v. Cologan*, 2 T. R. 189, *Howard v. Baillie*, 2 H. Bl. 618, (3) 7 T. R. 116, 117.

affect the high-sheriff, like those of the under-sheriff. They are not admissible as evidence of the agency, or of the authority under which he is supposed to act. This was determined in the case of *Drake v. Sykes* (1), before referred to; in which case, the distinction between the admissions of the under-sheriff and those of the bailiff was fully recognised. "The admission of the under-sheriff," said Mr. Justice Lawrence, "may affect the high-sheriff, because he is the general officer of the sheriff; but I do not think that the bailiff is his general officer." Nor are the bailiff's representations or admissions under any circumstances admissible, unless in the first instance the relation between him and the sheriff, in the particular transaction, is clearly proved by other independent evidence, as, by the warrant, or by proof of some recognition of the agency on the part of the sheriff. But when this relation has been proved, such admissions of the bailiff, as form a part of the transaction, in which he represents the defendant, and for which the defendant is responsible, are properly admissible in evidence against the sheriff. Thus, in the case of *North v. Miles* (2), an action for a false return of *non est inventus*, where it was proposed to give evidence of an acknowledgment by the bailiff to the plaintiff's attorney, on his inquiring, why the writ had not been executed, and this evidence was objected to, Lord Ellenborough ruled, that it was admissible: for, "although the bailiff's general conversation with any indifferent person certainly is not evidence against the sheriff, yet what he said on this occasion, when remonstrated with by the plaintiff's attorney, must be considered as part of his act touching the execution of the writ, for which the defendant is responsible." And in the case of *Bowsher v. Calley* (3), which was an action for an escape, Lord Ellenborough held, that what the bailiff had said, respecting his custody of the debtor, while he had the debtor in custody, must be considered as part of the act for which the defendant was responsible, and therefore strictly admissible in evidence,

For taking  
goods in  
execution.

(1) 7 T. R. 113. 117.

(2) 1 Campb. 389. The same point was ruled by Heath J. in *Nel-*

*son v. Sir W. Heron*, Linc. Sum. Ass. 1809.

(3) 1 Campb. 391.

For taking  
goods in  
execution.

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Thus, then, it appears, that the admissions of the bailiff, who is proved in the particular transaction to have acted under the authority of the sheriff, are received in evidence upon the same footing as the admissions of any other agent.

On the general subject of the admissibility of statements made by an agent, the judgment of the late Master of the Rolls, in the case of *Fairlie v. Hastings* (1), is so clear and comprehensive, that nothing can be added or taken from it without hurting its effect. "As a general proposition," Sir William Grant said, "what one man says not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declaration. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and, in many cases, by his acts. What the agent has said, may be what constitutes the agreement of the principal, or the representations or statements made by him may be the foundation or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted, to prove that the agent did make that statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or other of those ways, I do not know, how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business, in which the person, making that assertion, was employed as agent. The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say, a man is precluded from questioning or contradicting any thing which any person has asserted as to him, as to his conduct or his agreement, merely because that person

(1) 10 Ves. 123. Judgment of Sir William Grant.

has been his agent. If any fact material to the interest of either party rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion." For not arresting.

One of the most common defences to this action, is, that the third person, against whom the execution issued, had fraudulently assigned his effects to the plaintiff, for the purpose of defeating the execution of a creditor; and this defence, it is scarcely necessary to observe, may be proved under the general issue. The defendant, in such a case, will have to prove the writ, which issued against the debtor, and produce also an examined copy of the judgment, upon which the writ was grounded. (1) The writ, of itself, without proof of the judgment, is not sufficient evidence, unless where the action is brought by the person against whom the writ of *feri facias* issued, in which case proof of the judgment will not be necessary; for, though a judgment may be inferred from the *feri facias*, as between the parties to that suit, yet it cannot be so inferred against a stranger. (1) Defence.

The person, against whom the execution issued, is not a competent witness, on the part of the defendant, to prove the goods his property. (2) Witness.

2. Another kind of action against the sheriff is, for not arresting a debtor. The declaration, in this case, after stating in general terms the plaintiff's cause of action against his debtor, the process issued for the recovery of the debt, and the delivery of the writ or the precept to the sheriff, proceeds to aver, that the sheriff had notice of the debtor's being in his bailiwick between the delivery and the return of the writ. 2. Action for not arresting a debtor.

First, then, the cause of action must be proved, as averred. (3) And it has been held, that whatever evidence would Cause of action.

(1) *Lake v. Billers*, 1 Ld. Raym. 733. *Martyn v. Podger*, 5 Burr. 2639. *Ackworth v. Kempe*, 1 Doug. 40., 2 Black. 1104. See Vol. I. p. 391. (2) *Bland v. Ansley*, 2 New Rep. 531. See Vol. I. p. 64. (3) *Gunter v. Cleyton*, 2 Lev. 85. *Alexander v. Macauley*, 4 T. R. 611.

For not  
arresting.

be sufficient to charge the original party, in a suit against him, will also be admissible in this action, as evidence against the sheriff. Thus, in the case of *Sloman v. Herne* (1), an acknowledgment by the party, that the money had been paid on his account by the testator of the plaintiff, was admitted; and in two other cases (2), where the debt arose on a bill of exchange, an acknowledgment by the party, (the drawer of the bill,) of having received notice of its dishonour, was held to be sufficient evidence of that fact.

Proof of  
process.

Secondly, as to the proof of the process issued:—if the writ has been returned and filed, an examined copy of the writ and of the return will be the best evidence of the issuing and delivery of the process. If the writ has not been returned, as regularly it ought to be, the plaintiff will have to establish that fact, by proof of the requisite search at the Treasury; and, after proving the delivery of the writ to the under-sheriff, or at the sheriff's office, and a notice to the defendant's attorney to produce the original, secondary evidence of the process will be admitted.

Notice to  
sheriff.

Thirdly, as to the notice to the sheriff:—some proof, of the sheriff's having had an opportunity to arrest the debtor, will be necessary; as, that the debtor appeared in public in the sheriff's bailiwick after the delivery of the process, and that this was known to the under-sheriff or sheriff's officer, to whom the warrant was directed. The sheriff is bound to execute the process of the law in the most effectual manner; and it is the duty of the bailiff to use all means in his power, to search and make the arrest. If the person, against whom the plaintiff had a writ, does not abscond, but continues in his daily occupation, and appears publicly as usual, and the bailiff neglects to arrest him, the sheriff is responsible. A notice to the under-sheriff's agent in London, respecting the place where the debtor is

(1) 2 Esp. N. P. C. 695.

(2) *Gibbon v. Coggon*, 2 Campb.

188. *Williams v. Bridges*, 3 Starkie, N. P. C. 42.

to be found, will not be a sufficient notice to the sheriff (1): For taking such person cannot be considered the agent of the sheriff for insufficient pledges. the purpose of receiving the notice, his functions being of a nature entirely different.

The sheriff's officer, who has given security for the due execution of the process, is not a competent witness for the sheriff, to prove, that he endeavoured to make the arrest (2); for the verdict in this action against the sheriff might be given in evidence, in a subsequent action brought by him against the bailiff, as to the quantum of damages, sustained by the sheriff in consequence of the officer's neglect. Witness.

3. Another action against the sheriff is for taking insufficient pledges in replevin. On the subject of replevins in general, the stat. of Westm. 2. c. 2. provides, that sheriffs or bailiffs shall receive pledges for the pursuing of the suit, and for the return of the goods taken, if the return be awarded; and, in the particular case of a replevin for rent, the stat. 11 G. 2. c. 19. s. 23. enacts, that all sheriffs and other officers, having authority to grant replevin, shall, in every replevin of a distress for rent, take from the plaintiff and two responsible persons as sureties, in their own names, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded, before any deliverance be made of the distress. The statute then proceeds to require an assignment of the replevin bond by the sheriff. 3. Action for taking insufficient pledges.

In an action against the sheriff, for taking insufficient sureties in a replevin for rent\*, the common form of declaration

(1) *Gibbon v. Coggon*, 2 Campb. 189. (2) *Powell v. Hord*, 2 Ld. Raym. 1411. And see Vol. I. p. 60.

\* The measure of damages against the sheriff, in this action, is double the value of the goods distrained; and to that amount his responsibility is limited. See *Evans v. Brander*, 2 H. Bl. 547., which is later than the case of *Yeo v. Lethbridge*, 4 T. R. 433., or than *Concanen v. Lethbridge*, 2 H. Bl. 36.

**For taking  
insufficient  
pledges.**

states the taking of the distress, the delivery of the distress by the sheriff to the party distrained upon, the plaint of the party in the sheriff's court, and his subsequent default; it then proceeds to aver, that the sheriff, before delivering the distress, took a bond from the party with two sureties, which sureties were not sufficient for the purpose; and concludes with averring, that the distress has not been returned, nor the rent paid.

**Proof of  
replevying.**

The fact of the replevying of the distress, therefore, is to be proved; and the best proof of the fact, that the goods were replevied by order of the sheriff, is the original precept to deliver. For this purpose, a writ of *subpoena duces tecum* should be served on the bailiff; and, in case he may have returned the precept to the sheriff's office, a notice should also be served on the defendant's attorney to produce it at the trial. (1) A recognition of the bailiff's act on the part of the defendant, will have the effect of dispensing with such proof. (2)

**Replevin bond  
and sureties.**

The replevin bond, the execution of which is to be proved in the regular manner (3), will show, who are the sureties. Some proof also as to their insufficiency must be produced by the plaintiff; but it is reasonable, that slight evidence should be allowed to cast the burthen of proof on the defendant, who must be supposed to know the sureties, and who ought to have taken care of their sufficiency. (4) A smaller quantity of proof and more general evidence will be allowed, where the certainty of the fact lies within the knowledge of the other party. All evidence, observed Lord Mansfield (5), is to be weighed according to the proof, which it is in the power of the one side to produce, and in the power of the other to contradict.

(1) See ante, p. 277.

(2) See ante, p. 278.

(3) See Vol. I. p. 462. as to proof of deeds.

(4) *Saunders v. Darling*, Bull. N.P. 60.

(5) *Blatch. v. Archer*, Cowp. 65.



What either of the sureties has said, about the time of his executing the bond, in answer to applications by creditors for the payment of debts, (such as, frequent promises to pay, which promises he had as frequently broken,) have been held admissible evidence on this subject, the fact in issue being as to the fitness or unfitness of the sureties. (1) The sureties themselves are competent witnesses to prove, whether they were or were not sufficient. (2)

To recover money levied.  
Declaration of sureties.

4. In an action of assumpsit against the sheriff, to recover money levied under a writ of *feri facias* at the plaintiff's suit, the plaintiff will have to prove the taking and selling of the goods, and the connection between the bailiff and the defendant. These facts are established most satisfactorily, by proof of an examined copy of the writ, and of the defendant's return upon it, that so much had been levied (3): or it would be sufficient to prove, in addition to the proof of the sale, that the bailiff, who took the goods in execution, acted under the sheriff's warrant (3); or that a writ of *feri facias* was directed to the defendant as sheriff, and delivered at the sheriff's office.

4. Action to recover money levied.

After proof of the writ of *feri facias*, and the sheriff's return, that he had levied, it will not be necessary for the plaintiff to prove a demand of payment, previous to the commencement of the action (4): the defendant might have a good ground for relief, on an application to the court above, (stating that he had been always ready to pay over the money, and that a notice to this effect had been given to the plaintiff's attorney (5),) but this is not a sufficient defence at the trial of the cause; upon the sheriff's return, the sum levied was money had and received by the sheriff to the plaintiff's use; and, as the money had not been tendered to him, the plaintiff had

Demand of payment.

(1) Gwyllim v. Scholey, 6 Esp. N. P. C. 100.

(2) 1 Saund. 195. f. in note.

(3) Dale v. Birch, 3 Campb. 347. Wilson v. Norman, 1 Esp. N. P. C.

154. See ante, p. 277.

(4) Dale v. Birch, 3 Campb. 347.

Longdill v. Jones, 1 Starkie, N. P. C. 345.

(5) Jefferies v. Sheppard, 3 Barn. & Ald. 696.

For taking in execution goods of a tenant, &c.

Sheriff's return.

strictly a right to bring an action for recovering it, without any previous demand of payment. (1)

The return of the sheriff, upon the writ directed to him, is conclusive against him. It is also *prima facie* evidence of the facts stated in the return, against a third person, a stranger to the sheriff; for, as was said by Lord Ellenborough in the case of *Gyfford v. Woodgate* (2), "faith is to be given to the official act of a public officer, like the sheriff, even where third persons are concerned." The return on the writ, therefore, is evidence of this fact, that the money has been levied; but there the return closes, and the evidence likewise: the sheriff's return affords no proof, with respect to the subsequent disposition of the money, nor can it be presumed that the money has been paid over to the judgment-creditor, who sued out the execution. (3)

Poundage.

The sheriff is entitled to his poundage, which is the legal remuneration for his trouble in the business of the execution; and this he may retain. He may, therefore, at the trial, deduct the sum, due to him for poundage, from the proceeds of the sale.

5. Action for taking goods in execution, without paying arrears of rent.

5. Another action against the sheriff is for taking goods in execution and removing them, before the landlord of the premises has received his arrears of rent. This is a special action on the case (4), under the stat. 8 Ann. c. 14. s. 1., which enacts, "that no goods or chattels upon any messuage, lands, or tenements leased for life, term of years, at will, or otherwise, shall be liable to be taken by virtue of an execution on any pretence whatsoever, unless the party, at whose suit the said execution is sued out, before the removal of such goods from off the said premises by virtue of such execution

(1) *Dale v. Birch*, 5 Campb. 347.  
*Longdill v. Jones*, 1 Starkie, N. P. C. 345.

(2) 11 East, 299.

(3) *Cator v. Stokes*, 1 Maule & Selw. 599.

(4) An action of assumpsit for money had and received will not lie; *Green v. Austin*, 5 Campb. 260.

or extent, pay to the landlord of the premises, or his bailiff, all such sums of money, as are due for rent for the said premises at the time of such taking of the goods, provided the arrears of rent do not amount to more than one year's rent;" and the statute then provides, that in case the arrears exceed one year's rent, the party, paying one year's rent, may proceed to execute his judgment, as he might have done before the making of the act.

For taking in execution goods of a tenant, &c.

The plaintiff, in support of this action, will have to prove the lease of the premises, the arrears of rent, and the process of execution, as averred in the declaration; and, further, to show the connection between the sheriff and the officer. (1) He ought also to prove, that the sheriff, or the person who took the goods in execution upon the premises, had timely notice before the removal, that arrears of rent for the premises were due at the time of taking; for the sheriff is not bound to find out, whether rent is due, nor is he liable to an action, as a wrong doer, unless there has been a demand of rent before the removal. (2) No specific form of notice is required by the statute; and the only object in giving notice to the sheriff, is to establish his knowledge of the landlord's claim. (3) If it shall appear, from the proceedings under the execution—from any extraordinary haste or secrecy in the sale—or from other suspicious circumstances—that the sheriff knew of the landlord's claim, or expected a claim of rent to be made by him, that will be sufficient to make him liable to this action, without proof of any express notice. (4)

It is a good defence, to show, that the goods were removed with the consent of the plaintiff's agent, who had given notice of the arrears, and afterwards accepted an undertaking from the bailiff and auctioneer to pay the rent (5) This is a

Defence.

(1) See ante, p. 277.

(2) *Waring v. Dewberry*, 1 Str. 97. *Palgrave v. Windham*, 1 Str. 214. *Smith v. Russell*, 3 Taunt. 400. 3 Barn. & Ald. 442.

(3) 3 Barn. & Ald. 646. 2 Brod. & Bing. 67.

(4) *Andrews v. Dixon*, 3 Barn. & Ald. 645.

(5) *Rothery v. Wood*, 3 Campb. 25.

For escape on mesne process.

waver of the benefit of the statute; and whether the undertaking could, or could not, be enforced as an agreement, it is a clear justification to the sheriff, who manifestly has not been guilty of a tort.

6. Action for escape on mesne process.

6. A creditor may bring an action against the sheriff, to recover a compensation for damages, sustained by him from the escape of a debtor on mesne process, and from the consequent delay and prejudice in the recovery of his debt. The plaintiff, in this case, is to prove the cause of action against the party arrested, and the process sued out, as averred in the declaration. (1) The delivery also of the process to the sheriff, the arrest, and the escape, are to be proved.

Proof of debt.

In the first place, the plaintiff is to prove a debt due to him from the party, against whom the process issued (2); and must show the same cause of action, as is averred in the pleadings. (3) Thus, if the cause of action averred be for goods sold and delivered, that must be proved; though it need not be proved to have been for the specific sum mentioned in the declaration. (4) If the declaration state, that the party was indebted to the plaintiff for goods sold and delivered, and it should appear at the trial, that the goods had been sold on a credit of three months, which had not expired at the time of the arrest, such a variance would be fatal. (5)

Admission of debtor.

The admission of the debtor has been determined to be evidence of the debt against the sheriff, as it would be against the party himself. (6) Thus, where the debtor had been sued as the drawer of a bill of exchange, and it became necessary to prove the notice of dishonour, his acknowledgment of hav-

(1) See ante, p. 284.

(2) *Alexander v. Macauley*, 4 T.R. 611.

(3) *Parker v. Fenn*, 2 Esp. N. P. C. 476. n.

(4) *Gunter v. Cleyton*, 2 Lev. 85. Bull. N. P. 66.

(5) *White v. Jones*, 5 Esp. 162.

(6) See ante, p. 284. *Gibbon v. Coggon*, 2 Campb. 188. *Sloan v. Herne*, 2 Esp. N. P. C. 695.

ing received the notice was held to be sufficient; and the present Lord Chief Justice of the Court of King's Bench, who tried the cause, said, he understood the rule to be, that an admission, which would be evidence against the party, would also be evidence against the sheriff. (1)

For escape on  
mesne process.

The same process must be proved, as is stated in the Process. declaration. If the process proved is different, the variance will be a ground of nonsuit; as, if the process stated in the pleadings is a *latitat* in a plea of trespass, and that proved is in trespass *ac etiam*, &c. (2) So, where the declaration stated, that the party was "arrested under a writ indorsed for bail, by virtue of an affidavit now on record," but no proof of the affidavit was produced at the trial, the Court of Common Pleas held, that the plaintiff had been properly nonsuited. (3) In the case of *Wigley v. Jones* (4), the declaration alleged, that the party was brought before a judge by virtue of an *habeas corpus*, and by him committed to the custody of the marshal at the suit of the plaintiff, "as by the record thereof now remaining in the Court of K. B. manifestly appears," and, in proof of this commitment, the plaintiff produced in evidence the writ of *habeas corpus*, with the *committitur* indorsed thereon, from the office of the Clerk of the Papers in the King's Bench prison: it was objected, that this was not a record of the court, within any proper sense of the word; but the objection was over-ruled at the trial, and, as the Court of King's Bench afterwards held, properly over-ruled; for, according to the practice of the Court, such writs, with the *committitur* indorsed, are never returned, or filed, or kept by the Court at Westminster, or elsewhere, but have always remained, as any other warrant naturally would, in the hands of the officer, to whom it was directed, as his voucher and authority: nor can they properly

(1) *Williams v. Bridges*, 2 Starkie, 66. As to the distinction between material and immaterial averments, N. P. C. 42.

(2) *Gunter v. Cleyton*, 2 Lev. 85. see *R. v. Holt*, 5 T. R. 446. *Peppin*

(3) *Webb v. Sheriff of Middlesex*, v. *Solomons*, 5 T. R. 497. Vol. I. p. 1 Bos. & Pull. 281. 2 Esp. N. P. C. 205.

671. *Tildar v. Sutton*, Bull. N. P. (4) 5 East, 440.

For escape on  
mesne process.

be entered on record, either by themselves, or as part of any other record or proceeding; the allegation, therefore, respecting such a writ, is either an impertinent allegation, and may be rejected as surplusage, or at any rate may be considered, as not requiring any other proof than what it received by the production of the writ and return, which are *quasi* of record.

Proof of writ  
and agency of  
bailiff.

With respect to the proof of the writ, and proof of the connection between the sheriff and the bailiff by means of the warrant, little occurs to be added to the former statements. (1) The return of *non est inventus*, or other return on the back of the writ, is evidence against the sheriff of the delivery of the writ, being an acknowledgment of the fact under his own hand (2); and proof of his return of *cepi corpus*, and that the party neither put in bail above, nor was in the sheriff's custody at the return of the writ, dispenses with the direct evidence of the arrest and escape: both of these facts are sufficiently proved by the sheriff's return, and by the non-appearance of the party according to the exigency of the writ. (3)

An examined copy of the writ, which was given in evidence on the part of the plaintiff, contained also a copy of the sheriff's return; and it was contended, on behalf of the defendant, that this should be read at the same time, as part of one entire document; but Mr. Justice Holroyd held, that the parts were distinct, and that the defendant was not entitled to have the return read, as part of the document produced by the plaintiff. (4) The return of the sheriff in this case was, that the party had been rescued; and the return was held to be admissible in evidence, on the part of the defendant, though in this action clearly not conclusive.

Escape.

The escape on mesne process, which subjects the sheriff to this action on the case, is an escape after the return

(1) See ante, p. 277.

(2) *Blatch v. Archer*, Cowp. 65.  
*Tildar v. Sutton*, Bull. N. P. 66.

(3) *Fairlie v. Birch*, 3 Campb. 597.

(4) *Adey v. Bridges*, 2 Starkie N. P. C. 189.

of the writ. The form of the writ is, that he shall take the body of the debtor, and have him ready to produce on a certain day; it will therefore be sufficient, if he bring in the body on that day. There is a distinction, in this respect, between arrests on mesne process and arrests in execution. In the latter case, if the debtor is seen at large after the arrest, for the shortest space of time, as well before as after the return of the writ, it will be an escape in the sheriff. (1)

For escape in execution.

It can scarcely be necessary to observe, that the proof of the surrender at a place different from that alleged in the declaration, or of an escape on a different day, will not be material as a variance; if, in fact, the escape was after the return of the writ, and before the commencement of the action.

7. In an action for the escape of a debtor in execution, whether it be an action on the case by the common law, or an action of debt founded on the st. 13 Ed. 1. c. 11. and st. 1 R. 2. c. 12.\*) the plaintiff will have to prove, in ordinary cases, an examined copy of the record of the judgment, the issuing of the writ of *capias ad satisfaciendum*, the delivery of the writ to the sheriff, a legal arrest under the writ, and lastly an escape.

7. Action for escape in execution.

With respect to the proof of an examined copy of a record, it will not be necessary to repeat what has been stated on the subject in another place. (2) And as to the proof of the writ,

Judgment and writ.

(1) *Hawkins v. Plomer*, 2 Black. (2) See Vol. I. p. 388. 1048.

\* In the former action, the creditor may recover damages for the officer's misconduct, and still has a right to recover the debt against the original debtor: In the latter, he is entitled to recover at once the sum, for which the prisoner was charged in execution, namely, the sum indorsed on the writ and the legal fees of the execution; *Bonafous v. Walker*, 2 T. R. 126. *Hawkins v. Plomer*, 2 Black. 1049; and this is an advantage in the action of debt over the other remedy at common law.

For escape in execution.

if the writ has been returned, an examined copy of that, and of the sheriff's return indorsed upon it, will be conclusive evidence, against the sheriff, of the issuing and delivery of the writ. (1) If there has not been a return, the issuing of the writ is to be proved, and its delivery to the sheriff; and, notice to produce the writ having been duly served on the defendants' attorney, parol evidence of its contents will be admitted.

Warrant and arrest.

The proof of the warrant to arrest, in order to connect the defendant with the officer, who made the arrest, has been already discussed. (2) As to the arrest itself, it may be sufficient to observe, that the arrest must be by the authority of the officer named in the warrant; but he need not arrest with his own hand, nor need he be in the presence of the person arrested, or actually in sight, or within any prescribed distance at the time of the arrest. (3)

Escape.

If a debtor, who has been once taken in execution, is afterwards suffered to go at large, it is an escape; if with the knowledge and consent, or by the default, of the gaoler or sheriff's officer, a voluntary escape; if without his knowledge, a negligent escape. What shall be deemed a going at large, is difficult to be defined as a general proposition. The principle seems to be, as laid down by Mr. Justice Buller (4), that, whenever the prisoner in execution is in a different custody from that which is likely to enforce payment of the debt, there is an escape. The prisoner must be taken to prison in a convenient time; and what is convenient, is a question for the determination of the judge, who will admit of any reasonable delay; but if delay is made use of by the officer, as the means of giving more liberty than he ought, he will be liable for an escape. (5) If the sheriff's officer permit the prisoner to go in company with one of his followers, even to his own house for the purpose of settling his

(1) See ante, p. 277.

(4) *Benton v. Sutton*, 1 Bos. & Pull.

(2) See ante, p. 277.

27.

(3) *Blatch v. Archer*, Cowp. 65.(5) *Heath J. ib.* 28.



affairs, that also is an escape; for the custody of the follower, after the writ has been once executed, amounts to nothing; he could have no power to detain the prisoner, if he should choose to escape; and the warrant would not be any justification to him, if any mischief should ensue. (1) And though the prisoner was at large for the shortest time, even before the return of the writ (2), and though he afterwards returned into custody, it is still an escape, for which the sheriff is responsible.

For escape in execution.

An admission of the escape by the under-sheriff has been thought to be admissible evidence of that fact against the sheriff himself. (3) To prove a voluntary escape, the party, who has escaped, is a competent witness: the reason assigned is, because an escape is a thing of secrecy, a private transaction between the prisoner and gaoler (4): but, on general principles also, he appears to be competent; for he neither gains nor loses by the event of the immediate suit; nor can the verdict be used against him, either by the plaintiff or the defendant, in an action on the case brought by either of them, to recover damages sustained in consequence of such an escape. (5) If this is correct, the party is competent either to prove, or disprove, a voluntary escape. And it should also seem, that he is competent to prove a negligent escape, but not to disprove it; for, as an action on the case may be brought against him by the defendant for a negligent escape (6), though, not for one that is voluntary, he would be speaking against his own interest, if called as witness for the plaintiff; and for himself, if called by the defendant. The plaintiff may give

Proof of escape.

(1) *Benton v. Sutton*, 1 Bos. & Pull. 27. by Eyre C. J.

(2) *Hawkins v. Plomer*, 2 Black. 1048.

(3) See ante, p. 280.

(4) *R. v. Warden of the Fleet*, Salk. MSS. Bull. N. P. 67.

(5) That the defendant cannot maintain such an action, in the case of a voluntary escape, see *Eyles v.*

*Faikney, Peake*, N. P. C. 143. a. *Pitcher v. Bailey*, 8 East, 171. The principle is, that an officer, guilty of a breach of duty, cannot recover money, which he has paid in consequence of it, though for the benefit of the defendant.

(6) See *Fitz. N. B.* 130. *Sheriff of Norwich v. Bradshaw*, Cro. El. 53.

For escape in execution.

evidence of a negligent escape, under a count for a voluntary escape. (1)

The proof of the debtor's being in custody, and of the escape, is rendered more easy by the provisions of the st. 8, 9. W. 3. c. 27.; the eighth section of which enacts, that, if the marshal of the King's Bench, or warden of the Fleet, or other keepers of any other prison shall, after one day's notice in writing given for that purpose, refuse to show any prisoner, committed in execution, to the creditor, at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged to be an escape in law. And the 9th section enacts, that, if any person, desiring to charge any person with any action or execution, shall desire to be informed by the marshal or warden, or their respective deputies, or by any other keeper of any other prison, whether such person be a prisoner in his custody, or not, the said marshal or warden, or such other keeper, shall give a true note in writing thereof to any person so requesting the same, or to his lawful attorney, upon demand at his office for that purpose, or, in default thereof, shall forfeit the sum of fifty pounds; and if such marshal or warden, or their respective deputy exercising the said office, or other keeper, shall give a note in writing, that such person is an actual prisoner in his or their custody, every such note shall be accepted and taken as sufficient evidence, that such person was at that time a prisoner in actual custody.

The case of *Wigley v. Jones* (2) has been before mentioned, where, in an action for an escape on *mesne process*, after a commitment on a *habeas corpus*, the Court of King's Bench held, that the averment, "as by the record thereof, now remaining in the Court of K. B., more fully appears," might either be rejected as surplusage, or would be sufficiently proved by the

(1) *Bonafous v. Walker*, 2 T. R. 126. (2) 5 East, 440. See ante, p. 291.

production of the original writ, with the committitur annexed, from the office of the clerk of the papers of the King's Bench prison. But a different rule has been adopted in an action for an escape out of *execution*, where the declaration alleged, that the prisoner was by writ of *habeas corpus* brought before a Judge, and by him committed to the custody of the marshal, "as by the said writ and commitment thereon, now remaining in the said court, more fully appears (1): there, the Court of Common Pleas determined, that the proof of a commitment by the Judge, which was not filed of record, would not support the action.

For escape in execution.

The defendant cannot prove, under the general issue, that the prisoner escaped without his consent, and that he made fresh pursuit, and retook him before the commencement of the action, though this is a good defence, if pleaded (2); the stat. 8. 9 W. 3. c. 27. s. 6., expressly enacting, that the retaking on a fresh pursuit shall not be given in evidence, on the trial of any issue in an action of escape, unless specially pleaded. If the defendant plead, that there was not an escape, he cannot prove that there was no arrest; for an arrest is admitted by the plea. (3)

Plea of fresh pursuit.

If the defendant pleads the prisoner's return into custody before the bringing of the action, and that he thereupon afterwards kept and detained him in his custody in execution, which is traversed in the replication, the plea will be disproved by showing, that the prisoner after his return escaped again, and died out of custody (4); for though the plea is indefinite as to the period of detention, yet the defendant must be understood to mean, that there had been such a detention, as would make the return an answer to the action; in other words, that he had so kept and detained the prisoner, as to be no longer liable for the fresh escape.

Plea of return into custody.

(1) *Turner v. Eyles*, 3 Bos. & Pull. 456. (3) *Bull. N. P.* 67.  
 (2) *Roll. Ab.* 808. E. pl. 1. See 406. (4) *Chambers v. Jones*, 11 East, *Gilb. Ev.* 244, "plea of *nil debet*."

For extortion  
of bailiff.

8. Action for  
extortion of  
the bailiff.

8. The sheriff is also answerable for the extortion of his officer, which is defined by Lord Coke (1) to be the unlawful taking, by colour of his office, any money or valuable thing, either that is not due, or more than is due, or before it be due. It is a general principle, that the act of the bailiff is, for all civil purposes, the act of the sheriff; and where an extortion has been practised, the sheriff is liable to an action for penalties, or to an action for treble damages at the suit of the party aggrieved. (2) The general facts, to be proved, are, the writ, the warrant, and the misconduct of the officer.

The plaintiff must, in this case, as in the others before mentioned, connect the sheriff with the act of the bailiff, by proving, that the bailiff was acting under his authority at the time of committing the wrong complained of; and whether the sheriff employed this particular officer, will best appear by the production of the warrant. (3) If another person is appointed officer in the warrant, the sheriff will not be liable (4): he is responsible only for the act of that officer, whom he entrusts with his authority. The return of the sheriff, upon the process directed to him, of his having levied, is conclusive against him, that he adopts the act of the bailiff as his own. (5)

In an action of debt to recover penalties, incurred by the extortion of a sheriff's officer in executing a writ of *fiery facias*, if the declaration state the judgment, upon which the writ was founded, the judgment must be proved. (6) Here the execution is necessarily tied down by the judgment, and the judgment is therefore made material by the subsequent words, which are introduced. (7) The same principle seems to apply, where the action is brought by the party aggrieved, to recover treble damages; for in the case of *Crawley v.*

(1) Co. Litt. 368. b.

(2) St. 28 Eliz. c. 4. 52 G. 2. c. 28.

(3) See ante, p. 277.

(4) Jones q. t. v. Perchard, 2 Esp. N. P. C. 507. George q. t. v. Per-  
ring, 4 Esp. N. P. C. 63.

(5) See ante, p. 277.

(6) *Savage q. t. v. Smith*, 2 Black.  
1101. That this averment was un-  
necessary, see 5 T. R. 498.

(7) By Buller J., observing on the  
case of *Savage v. Smith*, 5 T. R.  
498.

Blewett (1), where, in an action for a false return upon a *feri facias*, the plaintiff declared on a judgment in the Common Pleas, and the copy of the record produced at the trial omitted to state before whom the plea was held, so that the judgment did not appear to correspond with that stated in the declaration, Lord Holt was of opinion, that this was a ground of nonsuit. The averment, therefore, of the judgment was material, and ought to have been proved, as stated; for, as Ch. Justice De Grey said in the case of *Savage v. Smith* (2), Lord Holt would not have nonsuited the plaintiff for an imperfect proof, when no proof at all was necessary.

For false  
return.

9. The plaintiff, in an action for a false return of *mesne process*, will have to prove the cause of action as averred (3), the writ and the sheriff's return upon it (4), and the warrant to the officer; and then must disprove the fact alleged by the sheriff in his return. The requisite proof of these several points has been before discussed, in treating of the evidence necessary in the other actions against the sheriff. In the action for a false return of the writ of *feri facias*, the plaintiff, besides proving an examined copy of the writ and the return, and the warrant, must prove the judgment, as stated in the declaration. (5) He must also falsify the sheriff's return. If the plaintiff, for instance, return, "*nulla bona*," the plaintiff ought to show, that the debtor had property in the sheriff's bailiwick between the teste and return of the writ.

9. Action for  
false return.

It is a good defence, on a return of *nulla bona*, that the debtor, at the time of the delivery of the writ, was bankrupt, and that a commission had issued against him. The defendant must, in that case, prove all the facts necessary to the commission. The sufficiency of the petitioning creditor's debt may, therefore, come into question; and, in order to prove the debt insufficient to support the commission, the plaintiff, in reply, may give in evidence the declaration of the

Plea of  
bankruptcy.

(1) 12 Mod. 128.

(2) 2 Black. 1104.

(3) See ante, p. 283.

(4) See ante, p. 284.

(5) *Crawley v. Blewett*, 12 Mod. p. 128.

For false  
return.

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petitioning creditor, one of the assignees, (made subsequently to the suing out of the commission, on a settlement of accounts between him and the bankrupt, when he stated what was owing to him at the time of the act of bankruptcy,) provided it appear that the assignees are the real parties to the defence. (1)

If the sheriff state, in his return to a writ of *feri facias*, that he has levied a certain sum, out of which he has paid a part to the landlord of the premises for arrears of rent, it will be incumbent upon him, in an action against him for an improper return, to prove this fact of rent in arrear (2): slight evidence will be sufficient, but some is necessary. The landlord is not a competent witness; because, if the action were to succeed, he would be liable to an action at the suit of the sheriff, in which action this judgment would be evidence of special damage. (2)

When the sheriff defends his return of *nulla bona*, on the ground, that the person, against whom the writ issued, was the domestic servant of an ambassador of a foreign state, it is competent to the plaintiff to prove the appointment colourable and fraudulent. (3) The question, whether the person was liable to have his goods seized, is one among many other questions, which sheriffs, in the execution of process, must determine at their own peril. In a case of real difficulty, said Lord Ellenborough, sheriffs may call for an indemnity, and the Court will enlarge the time for their making their return, till an indemnity is given.

Inquisition by  
sheriff.

If the sheriff doubts whether goods, which are pointed out to him as belonging to the debtor, are his property, he may summon a jury, in order to satisfy himself upon that question; and this inquisition may perhaps be admissible in

(1) Dowden v. Fowle, 4 Campb. 38. And see Penn v. Scholey, 5 Esp. 521.  
243. Kempland v. Macauley, Peake, N. P. C. 65. (2) Keightley v. Birch, 3 Campb. 47. (3) Delvalle v. Plomer, 3 Campb.

evidence, where the sheriff is charged with having acted from malice; but it is not admissible, even in mitigation of damages, For false return.  
in an action for a false return. (1)

In an action for a false return to a *testatum fieri facias* Variance. against the bail, the declaration stated, that the plaintiffs, by the judgment of the Court, recovered against the bail a certain sum, which was adjudged by the Court; and the proof of this averment was an office copy of the recognizance of the bail, and an office copy of the *scire facias* roll, which concluded in the common form, "therefore it is considered, that the plaintiffs have this execution against the bail:" the Court held, that this was a variance between the allegation and the proof: the allegation is, that by the *judgment* of the Court the plaintiff *recovered*; in other words, that the plaintiffs had *judgment to recover*; but the record only proved, that they had *judgment of execution*, or, more properly speaking, it is an award of execution. (2)

If the sheriff make a return of *nulla bona*, after having Witness. taken the goods of a debtor in execution at the suit of the plaintiff, a witness who claims property in the goods, and who has under that claim taken the goods out of the possession of the sheriff, is competent on the part of the defendant to prove his property in the goods; for he cannot be affected by the verdict: the sheriff, after his return of *nulla bona*, cannot maintain an action against him, having disclaimed all interest in the goods, and being precluded by his return. (3)

(1) *Glossop v. Pole*, 3 Maule & Selw. 175.

(2) *Phillipson v. Mangles*, 11 East, 516.

(3) *Thomas v. Pearce*, 5 Price, 547.

## CHAP. II.

*Of Evidence in Actions against Justices of the Peace.*

THE principal questions to be considered in treating of actions against justices of the peace, relate to the notice which is required previous to the suing out of process, to the commencement of the action, and to the effect of convictions and other proceedings as evidence.

*Notice.*

If an action is brought against a justice of peace, grounded upon some act done by him in the character of justice, the plaintiff cannot recover a verdict, unless he proves, at the trial, a notice to the defendant previous to the suing out of the writ. This proof is required by the stat. 24 G. 2. c. 44., which was introduced for the purpose of rendering justices more secure in the execution of their office; and the first section of which enacts, "that no writ shall be sued out against, nor a copy of any process served on any justice of the peace, for any thing done by him in the execution of his office, until notice in writing, of such intended writ or process, shall have been delivered to him."

The case in which a notice will be necessary, is, where the party complains of "something done by the justice in the execution of his office." If, therefore, the subject-matter is within his jurisdiction, and he intended to act as a magistrate at the time, however erroneously he may have acted, he is within the protection of the statute; though, in consequence of his erroneous proceeding, it may be said, the act was not done by virtue of his office. Thus, in the case of *Weller v. Toke*(1), in which a single magistrate had committed the mother of a bastard for not filiating the child,

(1) 9 East, 364. *Graves v. Arnold*, 3 Campb. 242.



whereas jurisdiction in such a matter is expressly given to two justices, who are to exercise it together; and in the case of *Briggs v. Sir Fr. Evelyn* (1), where a magistrate, who was lord of the manor, searched a house and took away a gun, (whereas, it was contended, magistrates are not empowered personally to enter a house for such a purpose,) the Court determined, that the defendant was entitled to a month's notice. Where a magistrate acts in another capacity; in other words, when the act done is wholly aliene to his jurisdiction, there he acts without the protection of the law, and a notice is unnecessary. Nor is it necessary to give notice previous to an action against the defendant, to recover penalties for acting as magistrate, without a legal qualification. (2)

With respect to the delivery of the notice: — it must be proved to have been delivered to the justice, or left at the usual place of his abode, by the attorney or agent for the party, who intends to sue out a writ or cause the same to be sued out or served, at least one calendar month before the suing out or serving of the same. (3) In computing this month, the day, on which the notice is served, is to be included; the time runs from the beginning of that day. (4) When the word "month" is used in a statute, without the addition of the word "calendar," or any other words indicating, that the legislature intended a calendar month, it is understood to mean a lunar month. (5)

Delivery of  
notice.

As to the form of the notice: — it must clearly and explicitly contain the cause of action, which the party claims to have against the justice of the peace; and on the back of the notice is to be indorsed the name of the party's attorney or agent, together with the place of his abode. (6) And the plaintiff shall not be permitted, on the trial, to

Form of  
notice.

(1) 2 H. Bl. 114.

(2) *Wright v. Horton*, Holt, N. P. C. 458.

(3) Sect. 1.

(4) *Castle v. Burditt*, 3 T. R. 623.

(5) *Lacon v. Hooper*, 6 T. R. 224.

(6) Sect. 1.

give evidence of any cause of action, except such as is contained in the notice.(1) This notice must be explicit and precise. It must be a notice of the intended writ of process, and must also specify the cause of action. If only the cause of action is stated, and no mention made of the intended process, the notice will not be conformable to the statute.(2) But the particular form of action, which the party intends to adopt, need not be specified, though the cause of action must.(3)

Notice mis-  
stating form  
of action.

The plaintiff, as we have just seen, is not required to give notice of his *form* of action. And though he should give notice of one form of action, and afterwards declare in another, it may perhaps be questioned, whether this would be a ground of nonsuit, provided the notice is correct as to the cause of action and the intended writ or process \* ;

(1) Sect. 5.

(3) *Sabin v. De Burgh*, 2 Campb.

(2) *Strickland v. Ward*, 7 T. R. 197.

631. n. *Lovelace v. Curry*, 7 T. R. 631.

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\* The point, as stated above, was not finally settled in the case of *Strickland v. Ward*, though Mr. Justice Yates certainly considered it a ground of nonsuit. There are two manuscript notes of this case, in the report of the case of *Lovelace v. Curry*, (7 T. R. 631.,) of which the note supplied by Mr. Justice Yates, who tried the cause, is much the fullest and most satisfactory. The notice in *Strickland v. Ward* was of an action on the case for false imprisonment, whereas the form of action afterwards adopted was trespass; and there was no notice of the writ or process. Several objections were taken: the first, as to the omission of the notice of the writ; the second, that the notice was of another form of action, which would not lie in this case; and thirdly, that the notice might mislead, for it was so far from apprising the defendant of the writ or process intended to be sued out, that the process in such an action must necessarily be of a nature quite different. Mr. Justice Yates, as the note states, gave his opinion decisively in favour of the objections. The cause was afterwards decided on another ground. The first objection, respecting the omission of the intended process, which was the important objection, was taken in the case of *Lovelace v. Curry*, and adjudged to be decisive against the plaintiff's right to recover. As to the second objection, (that the plaintiff had given notice of an *action on the case* for false imprisonment, and afterwards brought an action of *trespass*.) Lord Loughborough and Mr. Justice Gould, in the case of *Wood v. Folliott*, (3 Bos. & Pull. 552. in note,) where this point of the case of *Strickland v. Ward* was referred to, appear to have considered it as of little weight. The former said, "Would it not have been enough to have said *an action*, and was not the rest surplusage?" And Mr. Justice Gould, "All that the statute says, is 'the *cause* of action.'" See also *Robson v. Spearman*, 3 Barn & Ald. 493.

for if he gives an explicit notice of the real cause of action, and of the intended writ or process, which is afterwards sued out or served, he does all that the terms of the statute require. Nor does there appear to be much weight in the objection, that the defendant, on receiving notice of a form of action, not consistent with the intended process or with the subject-matter of complaint, might rely on nonsuiting the plaintiff in such a form of action, and, with this view, might have declined to tender amends to the party complaining, as he might otherwise have done: in answer to this objection, it may be said, the defendant is not misled with respect to the cause or ground of the plaintiff's action, or as to the intended process, so that he has an opportunity of making a tender of amends before the writ is sued out; or, if he chooses to make no tender, speculating on the chance of the plaintiff's misconceiving his remedy, he has still another opportunity of tendering amends, even after the service of process, by paying money into court (1); but if he still persists in not making a tender, calculating upon a nonsuit, and speculating *inter apices juris*, he has no just ground to complain of being misled. The question, therefore, is reduced to this; whether the plaintiff ought to be nonsuited, because he has inadvertently given notice of a wrong form of action, when such notice might altogether have been safely omitted, and when the notice itself would enable the defendant to detect the error. Now, the statute of George II. requires only that the notice should contain two particulars: first, the writ or process, which the plaintiff intends to sue out; and, secondly, the cause of action for which he sues. And though, as Lord Kenyon said in the case of *Lovelace v. Curry*, "the Court are bound to decide according to the law as they find it, without considering whether or not the legislature did right in requiring this particular notice," yet, on the other hand, in such a case they would be unwilling to go beyond

(1) See Sect. 4.

the letter of the law, lest actions of this sort should be entirely defeated. (1)

Indorsement  
of notice.

On the back of the notice is to be indorsed the name of the party's attorney or agent, together with the place of his abode. The notice need not be signed at the foot, either by the plaintiff or his attorney. First, as to the indorsement of the name of the attorney. An indorsement of the surname at length, together with the initial letter of the Christian name, will be sufficient. (2) And with respect to the fact of being an attorney, Lord Ellenborough held, in the case of *Sabin v. De Burgh* (3), (where the attorney, whose name was indorsed, being asked, whether at that time he had taken out his certificate, said, he had ordered his clerk to take it out, and had given him money for this purpose, but had never seen it,) that this was sufficient evidence of his being qualified to act as an attorney. Secondly, as to the description of the attorney's place of abode: the meaning of the Legislature was, that the party should have an opportunity of tendering amends; and the true interpretation of the statute appears to be, that, if the place, indorsed upon the notice, is the true place of the attorney's abode, it lies on the defendant to show, that such a description has not afforded him the opportunity of taking advantage of the statute (4); the statute does not require such information, as precludes the necessity of all inquiry (5); the description, indeed, should not be quite vague, and perhaps such a place ought to be stated, as may be sufficient for a venue. (6) The attorney's name at length, with the description "of Birmingham," has therefore been considered amply

(1) "I do not disapprove," said Lord Ellenborough, adverting to the case of *Lovelace v. Curry*, "of any thing laid down in that case; but I am not disposed to carry it farther, lest actions of this sort should be entirely defeated." *Sabin v. De Burgh*, 2 Campb. 198.

(2) *Mayhew v. Locke*, 7 Taunt. 65.

(3) 2 Campb. 198.

(4) *Eyre C. J.* in *Osborn v. Gough*, 5 Bos. & Pull. 554.

(5) *Rooke J.* *ib.* 555.

(6) *Chambre J.* *ib.*

sufficient. (1) In the case of *Taylor v. Fenwick* (2), the notice, which was signed by him in these words, "given under my hand at Durham," was clearly informal; for though in fact the attorney lived at Durham, yet that was not stated as the place of his residence, with respect to which the statute must be implicitly followed; the objection, in this case, was, not that the place of abode had been insufficiently described, but that nothing was stated, except merely the place at which the notice was signed. (3)

The contents of the written notice may be proved at the trial by a duplicate original (4); and it is not necessary, in this case, to show a previous notice to the defendant to produce the original, which was delivered to him. Or, if the plaintiff is not furnished with such a duplicate, notice to produce the original should be regularly served (5); and, after proof of this notice, parol evidence of the contents of the original will be admitted.

Proof of  
notice.

The plaintiff will have to prove, further, unless it appear on the face of the record, that the action was commenced within six calendar months after the act committed; the statute of George II. enacting, that no action shall be brought against any justice of the peace, for any thing done in the execution of his office, unless commenced within that time. (6) If the act complained of is a continued imprisonment, the magistrate is liable to an action for such part of the imprisonment, suffered under his warrant, as was within six calendar months before the commencement of the action (7); for the whole of the imprisonment is one continued trespass.

Commence-  
ment of  
action.

(1) *Osbourn v. Gough*, 2 Bos. & Pull. 551. In the case of *Stears v. Smith*, 6 Esp., 158., the attorney described himself of a place in London, but in fact the place was in Westminster, and Lord Ellenborough held the notice insufficient.

635., and stated in 3 Bos. & Pull. 555. in note.

5) 3 Bos. & Pull. 554.

(4) See Vol. I. p. 448.

(5) See Vol. I. p. 442.

(6) Sect. 8.

(7) *Massey v. Johnson*, 12 East,

67 *Pickersgill v. Palmer*, Bull. N. P. 24.

(2) Cited by Lawrence J. 7 T. R.

The commencement of the action is the suing out of the writ; and the suing out of a bill of Middlesex or *latitat* in the King's Bench (1), or of a *capias quare clausum fregit* in the Common Pleas (2), is as effectual, for this purpose, as the suing out of an original writ. The plaintiff must, in fact, take out the writ within the time prescribed. The teste of the writ will not be sufficient proof of the suing out; for it is the practice of the Court to teste *latitats*, taken out in the vacation, as on the last day of the preceding term, and a *latitat* sued out in a term is usually tested on the first day of that term; wherever, therefore, the true time of suing out a *latitat* is material, it may be shown, notwithstanding the teste. (3) Proof of the delivery of the declaration, within six calendar months after the act committed, will be sufficient evidence of the commencement of the action; for it establishes the fact of an existing suit at the time of the delivery. (4)

If the plaintiff sue out a writ within the six months, but neither the service nor the return of the writ is proved, and afterwards he sues out another writ out of time, which last writ is served, he cannot support his action; as, in the case of *Weston v. Fournier* (5), where the notice of action was for an imprisonment, which continued up to the time of the notice and afterwards — the writ of *latitat* was sued out about two months after the notice — the next process proved was an alias writ, sued out about eleven months after the notice — and the memorandum of the record of *nisi prius* was of the same term, in which the alias writ issued: here, the notice fixed the plaintiff to a date, from which the subsequent proceedings were to be reckoned; and the suing out of the second writ was at least *prima facie* evidence, that the first had not been served; then the next process was out of time, and no aid could be got from the memorandum of the record of *nisi*

(1) *Carth.* 233; 2 *Lord Raym.* 1441. (4) *Matthews v. Haigh*, 4 *Esp.* 100. *Harris v. Orme*, 2 *Campb.* 497. n.  
 (2) 2 *Black.* 925.; *Willes*, 257. (5) 14 *East*, 491.  
 258.  
 (3) 2 *Burr.* 964. 966.

*prius*; so that, as the first writ only was in time, it became necessary to prove its return. So in the case of *Stanway q. t. v. Perry* (1), where, in an action against a sheriff for the extortion of his bailiff, (which action must be commenced within a year,) the plaintiff gave in evidence two writs, the one a *capias ad respondendum*, the other a *capias per continuance*, both of which issued in the same term—the former was in time, but the latter was out of time, and this last alone was served—the declaration was of the same term: the Court held, that, if two writs be issued, one within a year after the offence, and the other not within, it is necessary that the first writ should be returned, in order to connect it with the second, and thereby to make the action appear to have been commenced in due time: for it is the return of the writ, which gives to the Court possession of the cause. But if only a single writ has been sued out, and that within the proper time, it will not be necessary to prove the writ returned (2): The mistake, said Lord Kenyon in the last cited case, proceeds upon the supposition, that the plaintiff could not declare upon that writ after two terms; but although, if he do not declare within that time, the defendant may sign judgment of non-pros, yet if the defendant omit so to do, the plaintiff may declare at any time within a year after suing out his writ.

If the plaintiff bring an action against a justice of peace, complaining of an act done by a constable, he will have to show, that the act, complained of, was done by the defendant's authority. A notice, therefore, should be served on the defendant, and a writ of *subpœna duces tecum* served on the officer, in order to compel them to produce the warrant; and after proof of such notice, secondary evidence of the warrant will be admitted. (3)

The defendant, in any action upon the case, trespass, bat- General issue.  
tery, or false imprisonment, brought against him for any thing

(1) 2 Bos. &amp; Pull. 157.

(3) See Vol. I. p. 442.

(2) *Parsons v. King*, 7 T. R. 6.

done by virtue of his office, may plead the general issue, not guilty, and give such special matter in evidence to the jury, as, if pleaded, would have been sufficient in law to have discharged the defendant. (1) This only allows the defendant to give that in evidence, which before they must have pleaded. (2)

Tender of  
amends.

By the statute of George II. (3), the justice may, within one calendar month after such notice given, (that is, the notice of the intended writ, or process, and of the cause of action, before mentioned), tender amends to the complaining party, or to his agent or attorney; and, in case the same is not accepted, may plead the tender in bar to any action brought against him, together with the plea of not guilty; and if, upon issue joined, the jury find the tendered amends to have been sufficient, they shall give a verdict for the defendant. A magistrate, not present at the execution of his warrant, is liable only to the extent of what was done in pursuance of the warrant, and not for any excess committed by the officer without his authority.

Conviction  
and other pro-  
ceedings.

A conviction by a justice of the peace, who has competent jurisdiction over the subject-matter, is, till reversed or quashed, conclusive evidence in favour of the justice, in an action against him for false imprisonment. Thus in the case of *Strickland against Ward* (4), tried before Mr. Justice Yates, (which was an action of trespass and false imprisonment against the defendant, a justice of the peace,) the defendant produced in evidence, under the general issue (5), a warrant signed by him, reciting a conviction of the plaintiff for unlawfully returning to a parish, whence he had been removed, and requiring the keeper of a house of correction to keep the plaintiff to hard labour; he also produced the conviction, referred to in the warrant, regularly drawn up: Mr. Justice Aston, upon this, gave his opinion, "that the conviction could not be controverted in evidence, but that, as the justice had

(1) St. 7 J. 1. c. 5. st. 21. J. 1.  
c. 12. s. 5.

(2) Cowp. 647.

(3) St. 24 G. 2. c. 44. s. 2.

(4) 7 T. R. 653. 12 East, 75.  
16 East, 21. *Brittain v. Kinnaird*,  
1 Brod. & Bing. 432. S.P.

(5) St. 7 Jac. 1. c. 5.



a competent jurisdiction of the matter, his judgment was conclusive, till reversed or quashed; and that it could not be set aside at *nisi prius*." The plaintiff was accordingly nonsuited.

Where the magistrate has committed to prison, not having any jurisdiction, he will be liable to an action for false imprisonment, though the conviction has not been reversed or quashed (1); as, where the plaintiff was convicted and committed to prison for destroying game, though, as it was proved, he had effects which might have been distrained, sufficient to answer the penalty, (the statute of 5 & 6 Ann. c. 14. enacting, that the penalty is to be levied by distress and sale of the offender's goods, and, *for want of distress*, the offender to be committed to the house of correction); (2) or, where the justice has committed to prison, on mere suspicion, without any information laid before him, as there ought to have been (3), or without summoning or hearing the plaintiff in his defence. (4) So, in the late case of *Groome v. Forester and Goodwin* (5), where an overseer of a parish was convicted under the stat. 17 G. 2. c. 38. s. 2., of neglecting to deliver over to the succeeding overseers a certain book belonging to the parish, particularly described in the information, and for this offence was adjudged to be committed to the common gaol, "to be safely kept, until he shall have yielded up *all and every the books* concerning his said office of overseer belonging to the said parish," which were also precisely the terms used in the warrant of commitment, the Court of King's Bench determined, that this commitment was not authorised by the act of parliament, and was entirely void: for the warrant of commitment casts upon the gaoler the function of enquiring and determining, what were "all and every the books concerning the office of overseer," for the yielding up of which he was to discharge the

(1) *Hill v. Bateman*, 2 Str. 710.  
*Crepps v. Durden*, Cowp. 640.  
*Morgan v. Hughes*, 2 T. R. 225. See  
 also *Fuller v. Fotch*, Rep. temp.  
 Holt. 247. Carth. 346. Hardr. 480.

(2) 2 Str. 710.  
 (3) 2 T. R. 225. 12 East, 82.  
 (4) 12 East, 82. *Harper v. Carr*,  
 7 T. R. 275.  
 (5) 5 Maule & Selw. 314.

prisoner, instead of requiring the gaoler to detain his prisoner, (as it ought to have done,) until he should yield up the particular book specified and described in the information; the warrant therefore subjected the prisoner to the risk of imprisonment for an indefinite period, namely, until he had complied with a condition of greater extent than was imposed by the act of parliament, and where the gaoler had not adequate means of judging, whether the prisoner should have in fact complied with the terms of the condition. The Court therefore determined, that the commitment made in pursuance of the adjudication, as well as the adjudication itself in respect of the imprisonment, was clearly an excess of jurisdiction, and that the imprisonment was a trespass in the committing magistrate, for which an action might be maintained.

The formal instrument of conviction may be drawn up at a future period, subsequent to the time when the conviction took place; even if drawn up after the commitment or levying of the penalty, it may still protect the magistrate, provided its date is warranted by the real time of the conviction (1): and however proper it may be to inquire into the time of drawing up the conviction, if the conviction itself is directly impeached, yet in a collateral proceeding, such as an action of trespass, the Court will give credit to the record of conviction, as having been made at the time when it bears date, and will not admit evidence to prove, that in fact it was not drawn up till after the commencement of the action. (2)

If the justice had a general jurisdiction over the subject-matter, the plaintiff will not be allowed to give evidence of facts, not stated in the conviction, in order to prove the conclusion drawn by the justice to have been erroneous. (3) In the case of *Cookson v. Gray* (4), which was an action of

(1) *Massey v. Johnson*, 12 East, 480. *Fullers v. Fotch*, Rep. Temp. 76. *Gray v. Cookson*, 16 East, 20. Holt, 287.

(2) 12 East, 81. 16 East, 20, 21.

(4) 16 East, 13. 21. 23.

(3) 16 East, 21. 23. 7 T. R. 635. n.  
See also *Terry v. Huntington*, Hardr.

trespass against the defendant for committing to prison the plaintiff, an apprentice, for ill behaviour in his master's service (1), and where one of the grounds for impeaching the conviction was, that the indenture of apprenticeship had been avoided, and was at an end before the misconduct complained of, the Court seem to have been of opinion, that, as this did not appear on the conviction, it could not be proved by extrinsic evidence; and that this was a sufficient defence, if the conviction, produced at the trial, would justify the imprisonment.

In the case of *Lowther v. Earl of Radnor* (2), where a justice had acted upon a complaint made to him upon oath, by the terms of which he had jurisdiction, the Court of King's Bench determined, that the party, against whom the complaint was made, having had regular notice, and being summoned to attend, ought to be confined, in an action of trespass against the justice, to the proof of such facts alone, as were laid before the magistrate at the time of his judicial inquiry, and cannot go into the proof of other facts, although perhaps the real facts of the case might not have supported the complaint: for how, said Lord Ellenborough, can the magistrates be affected as trespassers, if the facts, stated to them upon oath by the complainant, were such, whereof they had jurisdiction to enquire, and nothing appeared in answer to contradict the first statement.

The recital of a false fact, in the warrant for apprehension and in the warrant of commitment, as to the party, on whose information the warrants were granted, will not be material, provided a regular information was in fact taken previous to the warrant of commitment. Thus, in the case of *Massey v. Johnson* (3), the warrant to apprehend recited "that J. S. had made information and complaint upon oath, &c.;" two

(1) Justices of the Peace have jurisdiction in such case, by st. 20. G. 2. c. 19. s. 4. (2) 8 East, 119. (3) 12 East, 67.

days afterwards, the plaintiff being apprehended, the information of another person was taken, upon which the warrant of commitment issued, reciting, like the other warrant, the information of J. S.; this recital was disproved by J. S. himself; the conviction was made up formally at a subsequent time, and bore the same date as the warrant of commitment, which was in fact the day when the conviction took place; the Court of King's Bench held, that, as a regular information on oath had been laid before the magistrate, the magistrate was warranted in taking cognizance of the charge; and, the party having been heard upon the charge, the magistrate was authorised to commit, if in fact he convicted him of the charge; and the conviction might be drawn up in form at a future time. Mr. Justice Le Blanc added, that the objection would have assumed a very different shape, if there had been no information on oath of any person, whereon to found the conviction.

Action, after  
conviction  
quashed.

If the convicted party, after the conviction of the justice has been quashed, bring an action on the case, complaining of the magistrate's act as malicious and without reasonable and probable cause \*, he must prove this averment; he must show, that, upon the hearing before the magistrate, there appeared to be no ground for imputing the crime to him; the question is, not whether there was any actual ground for such an imputa-

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\* The st. 43 G. 5. c. 141. sect. 1. enacts, that, in all actions against any justice of the peace, on account of any conviction made by him, or for any act done by him, for the levying of any penalty, apprehending any party, or for the carrying of any such conviction into effect, in case such conviction shall have been quashed, the plaintiff, besides the value and amount of the penalty levied upon him, (in case any levy shall have been made) shall not be entitled to recover any greater damages than the sum of twopence, nor any costs of suit, unless it shall be expressly alleged in the declaration in the action (which action shall be an action upon the case only) that such acts were done maliciously and without any reasonable and probable cause. The second section of the same stat. enacts, that the plaintiff shall not be entitled to recover any penalty, which shall have been levied, nor any damages or costs whatsoever, in case such justice shall prove at the trial, that such plaintiff was guilty of the offence, whereof he had been convicted, or on account of which he had been apprehended or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence.

tion, but whether there *appeared* to be any before the magistrate; the plaintiff must prove a want of probable cause for the conviction, which he can only do, by proving what passed upon the hearing before the magistrate, when the conviction took place; for the conviction may have been unfounded, yet not malicious. (1)

(1) *Burley v. Bethune*, 5 Taunt. 583. by Gibbs, C. J. The plaintiff appeared in evidence at the hearing before the magistrate; and the nonsuit in this case was nonsuited for not being affirmed by the Court of Common Pleas. improving at the trial, what had ap-

### CHAP. III.

#### *Of Evidence in Actions against Constables, Excise Officers, and Custom-House Officers.*

**T**HE next actions, to be considered, are those against constables, officers of the excise, and custom-house officers.

First, as to actions against constables.

The statute, which has been before referred to, in treating of evidence in actions against justices of the peace (1), applies also to actions against constables. The 6th section of that statute enacts, that unless a demand, of a perusal and copy of the warrant, has been previously made without effect, "no action shall be brought against any constable, headborough, or other officer, or against any person acting by his order and in his aid, for any thing done in obedience to any warrant under the hand and seal of any justice of the peace." The object of this clause was the protection of those officers, who, being charged with the execution of magistrates' warrants, were subject to indictment, if they did not execute the warrant directed to them, or to vexatious actions, if they did. (2)

(1) Stat. 24 G. 2. c. 44.

(2) By Lawrence J., 5 East, 448.

**Demand of  
copy of war-  
rant.**

The demand to be made is a written demand of the perusal and copy of the warrant; it is to be made of the person, against whom the party complaining intends to bring the action, or to be left at the usual place of his abode; and this demand is to be made by the party intending to bring the action, or by his attorney or agent, and to be signed by the party who makes it; and the action shall not be brought, unless the demand has been refused for the space of six days.

The same section provides, that if this demand is complied with, by showing the warrant to the party demanding it, and by permitting him to take a copy; and if afterwards an action is brought against such constable, headborough, &c., without making the justice defendant, or if the action is brought jointly against the justice and constable, or headborough, &c., the jury, in either of those cases, on the production and proof of the warrant at the trial, shall give their verdict for the constable, headborough, &c., notwithstanding any defect of jurisdiction in the justice.

**Demand after  
six days.**

If the demand is made in time, and the officer, whose protection was the principal object of the above-mentioned clause, delay to comply with it, till after the expiration of the six days allowed him, he acts at his peril, and subjects himself in the interval to be sued as any common person; but if he complies before an action is commenced, though six days have elapsed, he is still within the protection of the statute. (1)

**Form of  
action.**

The statute, says Mr. Justice Buller, extends only to actions of tort: in an action, therefore, against an officer, to recover back money, which had been levied on a conviction by a justice of peace, the proof of having demanded a copy of the warrant has been thought not to be necessary. (2) Nor is a demand of a copy necessary, previous to the commencement of an action of replevin. (3) Churchwardens and overseers of

(1) *Jones v. Vaughan*, 5 East, 447. (3) *Fletcher v. Wilkins*, 6 East,

(2) *Feltham v. Terry*, Bull. N. P. 283.

24. See *Irving v. Wilson*, 4 T. R.

485. *Wallace v. Smith*, 5 East, 122.

the poor, acting under a magistrate's warrant of distress, are within this statute, and entitled to its protection equally with the officers mentioned by name. (1)

The officer is protected only when he acts in obedience to the warrant; and if the justice is not liable, the officer is not within the protection of the statute. (2) If the plaintiff, therefore, can show, that the officer has not so acted, — as, by showing, that he apprehended a different person from that described in the warrant (3); that, under a warrant of distress, he took the goods out of the jurisdiction of the magistrate, by whom it was granted (4); or that he broke into the plaintiff's house to take a distress (5), — the case is not within the statute, and the action may be maintained without making the magistrate a defendant; for in executing the warrant the officer has exceeded his authority (6): and in such a case, therefore, an action of trespass will lie against the constable, without a previous demand of the perusal and copy of the warrant. (6) An officer may, in many cases, be said to act in obedience to the warrant, though the justice had no jurisdiction, and though the warrant be an absolute nullity. If, for instance, he is commanded by the warrant to take the goods in a place particularly named, and he there takes them, he is protected, though the place may be out of the magistrate's jurisdiction; and though the warrant describes the goods, which are to be taken, with so much uncertainty, as to be absolutely void, yet the officer will be protected, if he act with as much precision in executing the warrant, as the justice in granting it. (7)

Officer, when protected.

The contents of the written demand may be proved by a duplicate original, without proof of a notice to produce the one delivered (8); or, if there is no such duplicate, secondary

Proof of demand.

(1) Bull. N. P. 24. Harper v. Carr. 7 T. R. 271.

(2) Money v. Leach, 5 Burr. 1742. S. C. 1 Black. 555.

(3) Money v. Leach, 5 Burr. 2 Maule & Selw. 260.

(4) Milton v. Green, 5 East, 257.

(5) Bell v. Oakley, 2 Maule & Selw. 259.

(6) 2 Maule & Selw. 259.

(7) See Price v. Messenger, 2 Bos. & Pull. 162.

(8) Jory v. Orchard, 2 Bos. & Pull. 41.

evidence of the contents will be admitted, after proof of a notice to the defendant to produce the original. The demand of the copy of the warrant, whether proved by a duplicate original, or by secondary evidence, must be shown to have been properly signed; and the statute directs, that it shall be "signed by the party demanding the same." In the construction of this act, (which is not to be construed with all the strictness of a penal act,) it has been held, that a demand, signed for the plaintiff by his attorney, is within the meaning of the statute a demand signed by the plaintiff. (1)

Commence-  
ment of ac-  
tion.

The 8th section of the stat. 24 G. 2. provides, that no action shall be brought against the constable, headborough, or other officer, or person, acting as before mentioned, unless commenced within six calendar months after the act committed. (2) The action must be commenced within this limited time, whether the officer has acted within his authority or has exceeded it; although, if he has been guilty of excess, and the justice be not liable, the party aggrieved need not demand a copy of the warrant. Thus, in the late case of *Theobald v. Crichmore* (3), in an action of trespass against a constable for breaking into a house to levy a church-rate, granted under the authority of the stat. 53 G. 3. c. 127. (the 12th section of which enacts, that an action, brought for any thing done in pursuance of the act, shall be commenced within three calendar months after the act committed,) it was contended, that this would not apply to the case, where the officer had exceeded his authority, and as in such a case a demand of a copy of the warrant would not be necessary within the meaning of the stat. 24 G. 2. c. 44. (4), so here the action might be commenced after the three months had expired: but the Court of King's Bench held the contrary: "The object of the Legislature," said Lord Ellenborough, "was clearly to protect persons acting illegally, but in supposed pursuance of the statute, and with a *bonâ fide* intention of

(1) 2 Bos. & Pull. 40. 42.

(2) As to proof of commencement of action, see ante, p. 307

(3) 1 Barn. & Ald. 227.

(4) See *Bell v. Oakley*, ante, p. 317.



discharging their duty under the act of parliament." And Mr. Justice Bayley said, "The point decided in *Bell v. Oakley* was, that it was not necessary to demand a warrant, where the magistrate could not be liable; but that does not apply to this case."

Constables, headboroughs, and churchwardens, and persons aiding and assisting them, may plead the general issue of not guilty, and give in evidence any special matter, which, if pleaded, would be a good and sufficient discharge and defence to the action. (1)

If a joint action is brought against the constable, who executed the warrant, and the justice who issued the warrant, and the constable has done the act, for which the action is brought, in obedience to the warrant, and without exceeding his authority, the jury, in this case, are directed by the statute, on proof of the warrant, to find their verdict for the constable, headborough, or other person acting in his aid. (2) If, therefore, nothing is proved against the constable beyond what he was justified in doing under the warrant, and his evidence should be wanted on behalf of the justice or other defendant, it will be competent to the jury, under the direction of the Court, when the other evidence for the defendants has been closed, to find their verdict for the constable; and then he will be a competent witness for the other defendants. But the verdict cannot properly be given in his favour, for the purpose of rendering him a competent witness, until the whole of the case of the other defendants, exclusive of the evidence which he may have to give, is entirely finished. (3)

Secondly, as to actions against excise officers.

The statute, before mentioned, relating to constables, did not extend to officers of the excise or customs. The legis-

2. Action  
against excise  
officer.

Suing out of  
writ.

(1) Stat. 21 J. 1. c. 12.

(2) See *supra*, p. 516.

(3) *Ward v. Bourne and Others*,  
Trin. T. 1821. MS.

Notice.

lature, therefore, by a later statute, has enacted (1), that no writ shall be sued out against, nor a copy of any process served upon, any officer of excise, or against any person acting by his order and in his aid, for any thing done in the execution of, or by reason of his office, until one calendar month next after notice in writing shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party, who intends to sue out such writ or process; in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person who is to bring such action, and the name and place of abode of the said attorney or agent. If this notice is not proved at the trial, the defendant will be entitled to a verdict. And no evidence of a cause of action, not contained in the notice, can be received. (2)

The statute also contains clauses respecting the tender of amends, the payment of money into court, and the proof of special matter under the general issue, similar to those in the case of an action against justices of the peace. (3) The action is to be commenced within three months next after the cause of action shall arise. And the defendant may plead the general issue, and give the special matter in evidence at the trial. (4)

The 35th section provides, that if any goods, liable to duties of excise or inland duties, shall be seized in pursuance of any act of parliament, or if any action shall be brought, by the owner or claimer of any such goods, against any officer of excise or for the inland duties, or against any person acting in their assistance, for any thing done in pursuance of any such act, the proof of the payment of the excise or inland duties upon the goods so seized, shall lie upon the owner or claimer

(1) Stat. 25 Geo. 5. c. 70. s. 30.

(2) Sect. 32.

(3) Sect. 31. 33.

(4) Sect. 34. and stat. 28 G. 3. c. 37. sect. 25. Before this general provision was introduced, excise of-

ficers had been allowed in several cases to give the special matter in evidence, under former acts of parliament. See *Wood v. Chessal*, 2 Black, Rep. 1254.

of such goods, and not on the person who seized the same, or against whom such action shall be brought.

The officers are entitled to notice in actions of trespass or tort, that they may have an opportunity of tendering amends: but the statute does not extend to actions of assumpsit. (1) The notice is to contain the place of abode of the person who intends to bring the action, as well as the cause of action. The intention of the legislature was, that the defendant might know where to find the plaintiff, in order to tender him amends on the receipt of the notice; it ought therefore to appear from the notice, where the plaintiff's place of abode is at the time when the notice is given. In the case of *Williams v. Burgess* (2), where the plaintiff's place of abode, at the time when the cause of action occurred, was sufficiently described, but it did not appear where his place of abode was at the time of giving the notice, (which was five weeks after the injury complained of,) the Court of Common Pleas held, that the notice was insufficient. A notice of action for seizing a ship of the plaintiff's, describing the ship as "the property of A. B. of Rotherhithe and of C. D. late of Rotherhithe," is a sufficient description of their places of abode; otherwise, a house of trade with partners abroad could not bring the action. (3)

A judgment of condemnation in the Court of Exchequer, where proceedings *in rem* have been instituted, is conclusive evidence in any other Court, as to all the world, that the goods were liable to be seized. (4) And a similar condemnation by the commissioners of excise appears to have the same conclusive operation. (4) But a proceeding *in personam*, such as a record of conviction for penalties, has not that con-

(1) *Irving v. Wilson*, 4 T. R. 487. 3 Bos. & Pull. 522. n., see ante, *Wallace v. Smith*, 5 East, 122. p. 306.

(2) 3 Taunt. 127.

(3) *Wood and Others v. Folliott*,

(4) See Vol. I. p. 353. And as to the effect of an acquittal in the Exchequer, ib. p. 356.

clusive effect, and is admissible only as any other judicial proceeding. (1)

5. Action  
against officer  
of customs.

Thirdly, as to the action against custom-house officers.

The stat. 24 G. 3. sess. 2. c. 47. s. 35. extends all the clauses and provisions of the former act of the 23 G. 3., concerning actions brought against excise-officers, to actions brought against any officer of the customs, or any person acting by his order and in his aid, for any thing done in the execution of his office, or by reason of his office, and to all proceedings in the action, in as full and ample a manner as if custom-house officers had been expressly named in the other statute. (2)

(1) Hart v. M'Namara, 4 Price, 134. See Vol. I. p. 352. (2) See ante, p. 520.

#### CHAP. IV.

#### *Of Evidence in Actions brought by, or against, the Assignees of a Bankrupt.*

THE assignees of a bankrupt, in suing on a cause of action prior to the act of bankruptcy, will have to prove, on the general issue; first, the bankruptcy of the party; secondly, the property or cause of action in the bankrupt; thirdly, their own interest as assignees. Of these, the first and last are the only points, which require any discussion; the second, that as to the property or cause of action in the bankrupt, being a general question of title. In order to establish the first point, it will be necessary to show, that the party was a trader within the meaning of the several statutes upon this subject, and that he has committed an act of bankruptcy; and the interest of the plaintiffs as assignees will be established, by showing, that

the commission was regularly granted, and an assignment of the bankrupt's effects duly made to the plaintiffs.

The same proofs will be equally necessary, where the cause of action has arisen subsequent to the bankruptcy, as where it was prior, if the plaintiffs have no title to recover except as assignees; and this, although they do not state themselves to be assignees in the pleadings. (1) But where the defendant has himself contracted with the plaintiffs, their title is founded immediately upon the contract, and they may recover without proving themselves to be assignees (2); even when they sue in that character, the proof appears to be superfluous and unnecessary, provided they establish a title to recover, independent of such averment. The same principle must equally apply to the case, where the contract, which is the cause of action, was originally made between the defendant and the bankrupt, (who was not competent to make such contract, from not having obtained his certificate,) and which has been since affirmed, and made the subject-matter of another contract between the defendant and the plaintiffs; as, in the case of *Evans v. Mann*, above cited (2), an action for goods sold and delivered, where an uncertificated bankrupt sold goods to the defendant, who paid part of the price, and afterwards it was agreed between the defendant and the plaintiffs, that he should retain the goods, and pay what remained after the part-payment; here there was an actual contract between the plaintiffs and the defendant, relative to the subject-matter in dispute, and not merely a promise by implication of law; the action, therefore, is founded on an actual contract between the parties to the suit, and the plaintiffs are entitled to recover *suo jure*.

The first point, then, to be established, in proof of the plaintiff's claim, is the trading; and, on this subject, it will be material to see how traders are described in the several acts of parliament. The stat. 21 J. 1. c. 19. s. 2. (which follows very nearly the words of the two earlier statutes of

(1) See Cowp. 570.

(2) *Evans v. Mann*, Cowp. 569.

19 Eliz. c. 7. and 1 J. 1. c. 15.,) describes the persons subject to the law of bankruptcy, in the following terms: "persons using the trade of merchandise by way of bargaining, exchange, bartering, chevisanse, or otherwise, in gross or by retail, or seeking their living by buying and selling, or using the trade or profession of a scrivener, receiving other men's monies or estate into their trust or custody." The stat. 5 G. 2. c. 30. s. 39. subjects bankers, brokers, and factors, to the laws concerning bankrupts; and by another section (sect. 40.,) excludes farmers, graziers, or drovers of cattle, and all receivers of taxes granted by act of parliament.

These provisions, it may be observed, were enacted with a view of defining more accurately the persons, who should be considered as subject to the bankrupt laws. They describe such persons only, to whom extensive credit is given in the actual course of their business, and for the very purpose of carrying it on; and it is the protection of the persons who have so given credit, which is the professed object of the statutes. (1) The question, whether a person of a particular description has used the trade of merchandise, in the sense which the legislature has affixed to the term, is a question for the determination of the judge, upon the several facts found by the jury. Where particular employments are not specified, (such as that of a scrivener,) the general description cannot be satisfied, unless there be both a buying and selling: this is implied in the words "using the trade of merchandise;" for a merchant is so denominated from his being a buyer to sell again. (2) If the bankrupt is described in the commission, as a dealer in a particular description of articles, evidence may be admitted, under the general words, to show, that he was a general merchant, or carried on any other particular species of trade. (3).

(1) See the judgment of Lord Ellenborough in the case of *Sutton v. Weeley*, 7 East, 448. See also Lord Loughborough's judgment in *Parker v. Wells, Cooke's Bank*. L. 41.

(2) 7 East, 448.

(3) *Hale v. Small*, 2 Brod. & Bing. 25. 29.

Where the person belongs to a class, which is excluded by the bankrupt laws, as, if he is a farmer, (who yet may be a bankrupt, although not such in the capacity or character of a farmer,) the question for the jury will be, whether the acts of buying and selling were done collaterally to the occupation of the farm with a view to profit, or were incident to that occupation (1); and, upon this subject, the important consideration will be, as to the nature of the acts themselves, and the use to which the bought articles were applied. The acts of buying and selling may be so frequent, so general, and so extensive, as evidently to have no reference to the business of farming: they may be transacted so publicly, so regularly, and with such a manner and semblance of trafficking, as to show a manifest intention in the party to hold himself forth a general dealer in such articles. On the other hand, they may be only occasional acts, or incidental to the occupation of the farm, and connected with the business; such, in short, as negative the supposition of his being a general dealer, or of seeking his livelihood by buying and selling. Buying for the purpose of selling again is not decisive of the question; even to buy solely and entirely for that purpose, appears to be rather equivocal, although in one case great stress was laid upon such evidence (2); for still it may be incidental to the occupation of the farm, and to the farming business. The true question is, whether the farmer bought with a view to the making of a profit as a trader, independently of the occupation of his farm. (3)

The next fact to be proved, is, that the trader has committed an act of bankruptcy. The several acts of bankruptcy, some one of which it will be necessary to prove, are described at length in the three following statutes; st. 1 J. 1. c. 15. s. 2., st. 21 J. 1. c. 19. s. 2., and st. 5 G. 2. c. 30. s. 24.

2. Act of  
bankruptcy.

(1) *Stewart v. Ball*, 2 New. Rep. 79. *Chambre J.* said, that the finding of the jury in the former case was a very strong one.

(2) *Bartholomew v. Sherwood*, 1 T. R. 573. in note. But see *Stewart v. Ball*, 2 New. Rep. 81., where (3) *Patten v. Browne*, 7 Taunt. 409.

The first of these statutes, st. 1 J. 1. c. 15. s. 2., (which repeats a provision in the earlier statute of 13 Eliz. c. 7. s. 1.,) enacts, that any person using the trade of merchandise, &c., (describing, in the terms before mentioned, the persons who were to be made subject to the bankrupt laws,) who shall depart the realm or begin to keep house, or otherwise absent himself, or suffer himself willingly to be arrested for any debt or other thing not grown or due for money delivered, wares sold, or any other just or lawful cause or good consideration or purposes, or suffer himself to be outlawed, or yield himself to prison, or willingly or fraudulently procure himself to be arrested, or his goods, money, or chattels, to be attached or sequestered, or depart from his dwelling-house, or make or cause to be made any fraudulent grant or conveyance of his lands, tenements, goods, or chattels, to the intent or whereby his creditors shall or may be defeated or delayed for the recovery of their just and true debts, shall be accounted and adjudged a bankrupt.

The stat. 21 J. 1. c. 19. s. 2. enacts, that any such person who shall, either by himself or others by his procurement, obtain any protection, other than such person as shall be lawfully protected by the privileges of parliament, or prefer or exhibit any petition or bill against his creditors, to compel them to accept less than their just and principal debts, or to procure time, or longer days of payment than was given at the time of their original contracts; or, being arrested for debt, shall after his arrest lie in prison two months or more upon that or any other arrest or detention in prison for debt; or, being arrested for the sum of one hundred pounds or more of just debts, shall, at any time after such arrest, escape out of prison, shall be adjudged a bankrupt, and, in the case of such lying in prison, shall be so adjudged from the time of the first arrest.

The stat. 5 G. 2. c. 30. s. 24. enacts, that if any bankrupt, after issuing of any commission against him, pay to the per-



son who has sued out the same, or otherwise give or deliver to such person goods or other satisfaction or security for his debt, whereby such person shall privately have and recover more in the pound in respect of his debt than the other creditors, such payment of money, delivery of goods, or giving greater or other security or satisfaction, shall be deemed to be an act of bankruptcy, whereby, on good proof thereof, such commission shall and may be superseded.

The words, "to the intent, or whereby, his creditors shall or may be defeated, &c." in the first of these statutes, refer to all the acts of the trader that are previously mentioned. It is his departing from the realm, or beginning to keep house, or making a fraudulent grant, &c., with such intent, that constitutes the act of bankruptcy. And the words "with the intent or whereby" are considered as equivalent and synonymous with these words, "with the intent, or that thereby," and not as meaning, "with the intent and whereby," his creditors may be defeated. The objection to this latter construction, which was at one time adopted (1), is, that it would require both the intent and the consequence of delay to concur, in order to constitute the act of bankruptcy; and thus the bankruptcy would be made to depend not merely on the acts and intents of the bankrupt himself, however clear and unequivocal they may be, but upon the fortuitous coincidence of the acts of other persons; and those acts, particularly in the instance of a departure from the dwelling-house, are less likely to concur, in the proportion in which that departure is most notorious. (2) Nor can the words "with the intent, or whereby," be properly understood in their literal and disjunctive sense; for, by such a construction, the single circumstance of the delay of creditors, in consequence of the act of the trader, would make him a bankrupt, although the act itself may have been perfectly innocent, involuntary, or even necessary. The former construction,

Intention of  
trader.

(1) Fowler v. Padget, 7 T. R. 509. son v. Liddell, 9 East, 493. And see

(2) See the judgment of Lord Lord Eldon's judgment in Wydown's Ellenborough in the case of Robert- case, 14 Ves. 80

therefore, which makes the act of bankruptcy depend upon the intent, with which the specific act was done, is now adopted, both from the reason and convenience of the thing, and as most consistent with the several clauses of the statute of James, and also with a former statute on the same subject in the reign of Elizabeth. (1)

The rule, then, is, that departing from the realm, or departing from the dwelling-house, or doing any other of the acts specified in the statute, with intent to delay creditors, is an act of bankruptcy, although no creditor may have been in fact thereby delayed. (2) The intention of the party will be more or less apparent, according to the varying circumstances of each particular case. In general, his conduct previous to his departure, his declarations at the time of departing, and the state of his affairs, are the strongest indications of the motive of his conduct. And though the delay of creditors was not the immediate or principal object of the party, yet if that must have been the necessary consequence of such a proceeding, it would be evidence of his intent to delay or defeat his creditors (3); as he must be supposed to foresee and intend, whatever is the necessary consequence of his own acts.

Keeping  
house.

Beginning to keep house, with the intent that creditors may be defeated or delayed in the recovery of their just debts, is an act of bankruptcy. The length of time in keeping house cannot be material; in the very first moment that the act is done with such a specific intention, the trader has become a bankrupt. The usual evidence of this act of bankruptcy is a denial of the trader to a creditor, who calls to see the trader and demand payment of his debt, such denial being authorised by the trader, and the

(1) 13 Eliz. c. 7.

(2) *Robertson v. Liddell*, 9 East, 487. *Williams v. Nunn*, 1 Taunt. 270.

(3) *Lawrence J. in Fowler v. Padget*, 7 T. R. 516. And Lord

*Ellenborough*, in *Ramsbottom v. Lewis*, 1 Campb. 279. And *Gibbs C. J. in Holroyd v. Whitehead*, 5 Camp. 530. See also 1 Stark. N. P. C. 146.

trader being then at home. The denial ought to appear to have been made to a creditor, or to some one calling on his behalf. (1) The act of bankruptcy does not depend upon the intention with which the creditor comes, but upon the intention of the debtor. (2)

The denial to a creditor is evidence of the intent to delay, if unexplained; but it may admit of explanation, like any other equivocal act. Sickness, or the unseasonableness of the hour, or a particular engagement, or other circumstances, to which the denial may be naturally attributed, may satisfactorily explain the act, and repel the presumption of its having been done with the supposed intent to delay creditors. (3) A denial by the trader's clerk may be considered as authorised by the trader; unless it is shown to have been made without his authority.

But though an authorised denial to a creditor, on his requiring to see his debtor, is the most usual and familiar evidence of *beginning to keep house* within the meaning of the statute, it is not the only evidence, by which this may be proved. (4) If a trader has no servant, the act cannot be evinced through such a medium. In that case, if he shuts himself up in his house, debarring all access to it, whereby his creditors are delayed, an act of bankruptcy is established by proof of his having done so. And, generally, if a trader secludes himself in his house, to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep house within the meaning of the legislature, and commits an act of bankruptcy. (5)

The denial to a creditor, it is always to be remembered, is merely evidence of the intention, with which the act specified

(1) *Ex parte Hague*, 1 Rose, Bank. Cas. 150. Coke's B. L. 59. *Smith v. Currie*, 3 Campb. 549.

(2) *Ex parte White*, 3 Ves. and Beam. 128. *Ex parte Harris*, 2 Rose, Bank. Cas. 67. *Lloyd v. Heathcote*, 2 Brod. & Bing. 388. (4) By Lord Ellenborough, *Dudley v. Vaughan*, 1 Campb. 271.

(3) *Bull. N.P.* 39. *Round v. Hope*, 271. (5) *Dudley v. Vaughan*, 1 Campb. 271.

(such as beginning to keep house, or departing from the dwelling-house, &c.) is supposed to have been done. It is the cause of delay to the creditor, and like every other act, which necessarily produces such a consequence, is presumptive evidence of an intention to procure that delay. But the denial at the time of keeping house, &c. is not, merely of itself, abstracted from all intention and design, a specific act of bankruptcy. It is a medium of proof, but not necessary or indispensable proof; in other words, it is evidence of the rule, but not the rule itself. If a trader, therefore, in insolvent circumstances, or pressed with debts, were to seclude and conceal himself in his house, giving orders to his clerk to deny him generally to every person, this would be justly considered as strong evidence of "a keeping house with intent to delay creditors," although in fact it should not appear, that the clerk had actually denied him to a creditor, or that any creditor had been delayed. (1)\* It is evidence for the consideration of the jury, who have to determine, under all the circumstances of the case, whether the party did the act with the intent, imputed to him, of delaying his creditors: (2) The case of *Robertson v. Liddell* (3) having so fully established, that the intent, and not the actual delay, is what the statute meant, it must be immaterial, whether in fact there was any delay, or even whether there was any possibility of delay. The act of bankruptcy, as Mr. Justice Bayley said in the case of *Chenoweth v. Hay* (4), depends on the intent to delay, and not on the intent being productive of the effect.

(1) *Dickinson v. Foord*, Barnes, 1 Maule & Selw. 677. And see 160. See the reasoning in the 14 Ves. 86.  
 judgment of Lord Ellenborough in (2) 1 Taunt. 273. Vincent v.  
 the case of *Robertson v. Liddell*, Prater, 4 Taunt. 605.  
 9 East, 487. *Mucklow v. May*, (3) See ante, p. 327.  
 1 Taunt. 479. *Williams v. Nunn* (4) 1 Maule & Selw. 679.  
 1 Taunt. 270. *Chenoweth v. Hay*,

\* There are several cases, in which the contrary has been decided. See *Hawkes v. Saunders*, Coke's B. L. 79. *Jackmar v. Nightingale*, Bull. N. P. 40. (These cases are stated in 1 Selw. N.P. 177. 3d. Ed.) *Garret v. Maule*, 5 T. R. 575. In the last cited case, (in which the evidence of the

The making of a fraudulent grant or conveyance of the trader's lands or goods, &c., to the intent or whereby his creditors shall or may be defeated or delayed for the recovery of their just and true debts, is declared to be an act of bankruptcy. (1) The act of bankruptcy, then, consists in the fraud intended against the creditors, which is carried into effect by the execution of the deed : and whether a person has been guilty of fraud in a particular transaction, is generally a conclusion of law upon the facts proved. The circumstances extrinsic of the deed, most commonly insisted upon as evidence of fraud, are the following : the non-delivery of the effects into the actual possession of the grantee according to the tenor of the conveyance ; the fact of the conveyance being made in contemplation of bankruptcy ; the secrecy, the unseasonable hour, and other suspicious appearances, when the conveyance is executed. On the other hand, the fairness and equity of the transaction, the benefit resulting to the general creditors, and the solvency of the trader at the time of his executing the deed, are circumstances of honesty, and strongly in his favour. On the plain construction of the words of the statute it might be reasonably inferred, that only such conveyances can be acts of bankruptcy, as are therein specified and described ; namely, such as have been made with the intent, or whereby the creditors shall or may be defeated or delayed in the recovery of their just debts. How-

Fraudulent  
grant.

(1) See ante, p. 326. The cases on this subject are collected in *Montague's Dig. Bank. L.* vol. i. p. 56, 57.

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act of bankruptcy was like that above stated in the text, and an arbitrator had determined that the proof failed, because a denial had not been proved,) a rule for setting aside the award being applied for, Lord Kenyon said, " on trials in cases of this kind, the question has always been asked, whether or not the debtor was denied to the creditor ? which shews, in what light the statute has been considered. I will not presume to say, whether or not this construction should have been put on the statute at first ; but that construction having obtained, I am afraid now to disturb it." It may be observed of all these cases, that at the time when they were determined, the words of the statute received a construction different from that which has been so firmly established by the case of *Robertson v. Liddell*, 9 East, 487. The construction, which then prevailed, was the same that was afterwards adopted in the case of *Fowler v. Padget*, 7 T. R. 509. ; and this has been over-ruled by the case of *Robertson v. Liddell*.

ever, the Courts of common law have in several instances determined, that a conveyance of all the trader's estate and effects, or of all with a merely colourable exception (1), is in itself a complete act of bankruptcy; and this decision has proceeded upon two reasons: first, that the trader necessarily deprives himself, by such an act, of the power of carrying on his trade; secondly, that he endeavours to put his property under a course of application and distribution among his creditors, different from that which would take place under the bankrupt law (2): reasons, which manifestly have no reference to the intent or effect designated by the legislature. The rule, however, has been so long settled, that it is too late at this time to examine the principle. (3) A conveyance also by a trader, of only part of his property, made voluntarily by him, in order to give a preference to particular creditors, to the prejudice of the general creditors, in an act of bankruptcy. (4)

Where the act of bankruptcy, insisted upon by the plaintiffs, is a fraudulent grant or conveyance, and the deed is produced in evidence, the execution must be proved in the ordinary course. (5) An admission by the defendant, of the execution of the deed, will not dispense with the evidence of a subscribing witness; not, even if the defendant is a party to the deed. (5) And if the defendant, at the trial, should himself produce the deed in compliance with a notice, this will not be a sufficient ground for dispensing with the ordinary proof (6), although that was at one time considered to be the rule (7): the mere possession of an instrument by one party cannot in general absolve the other party from the necessity of calling the attesting witness. But where the defendant, in pursuance of a notice, produces a deed, under which he holds property,

(1) *Rust v. Cooper*, Cowp. 629., by Lord Mansfield.

(2) See Lord Eldon's judgment in *Dutton v. Morrison*, 17 Ves. 199.

(3) *Ib.*

(4) *Pulling v. Tucker*, 4 Barn. & Ald. 382.

(5) See Vol. I. p. 462.

(6) *Gordon v. Secretan*, 8 East, 548. See Vol. I. p. 451.

(7) *R. v. Middlezoy*, 2 T. R. 43. *Bowles v. Langworthy*, 5 T. R. 366.

the instrument may, perhaps, upon the principle laid down in the case of *Pearce v. Hooper* (1), be properly considered a valid instrument, so far as relates to the execution, against the defendant who claims under it. \*

One of the acts of bankruptcy, as before mentioned, is the lying in prison two months or more after an arrest for debt. The detention, therefore, and the cause of the detention, are to be proved. For the purpose of proving the detention in prison, the prison-books, containing entries of the dates of the several commitments and discharges, are admissible; but they are not evidence of the cause of the commitment: the committitur itself is higher proof, and, if in existence, ought to be produced. (2)

The assignees will not be obliged at the trial to insist on the specific act of bankruptcy, upon which the commission was founded; but they are at liberty to repudiate this, and rely upon

Lying in prison.

Proof of any act prior to commission.

(1) 3 Taunt. 62. See Vol. I. (2) *Salte v. Thomas*, 3 Bos. & Pull. p. 452. 188.

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\* Upon this principle, perhaps, the decision in the case of *Bowles v. Langworthy* (a) may be supported. That was an action of trover by assignees, to recover goods of the bankrupt, taken by the defendant. The act of bankruptcy, relied upon by the plaintiff, was a bill of sale, from the bankrupt to the defendant, of all his effects; and, under that bill of sale, the defendant had taken the goods in question. The plaintiff, instead of proving the execution of the instrument by the attesting witness, produced the defendant's examination before the commissioners, in which examination he had admitted the execution; and this was held at the trial, and afterwards adjudged by the Court of King's Bench, to be sufficient evidence. Lord Kenyon and Mr. Justice Buller decided the point on the authority of the case of the *King v. Middlezoy*. However, the case of the *King v. Middlezoy* has been over-ruled, (see Vol. I. p. 451.); and it is now clearly settled, that an admission by the defendant, in an answer in Chancery, will not dispense with the regular proof of execution. (*Call v. Dunning*, 4 East, 55. See Vol. I. p. 463.) The authority, therefore, of the case of *Bowles v. Langworthy*, unless it may be rested on the ground suggested above, cannot any longer be supported.

(a) 5 T. R. 366.

another. (1) The act of bankruptcy must be proved to have been committed before the issuing of the commission; and, if that is proved, it is immaterial how recent it was before its issuing. (2) If the issuing of the commission, and the act of bankruptcy, happened on the same day, evidence is admissible to show, that the commission was issued (that is, sealed) posterior to the act of bankruptcy. (3)

**Joint act of  
bankruptcy.**

If a partner in a banking concern, residing at the place where the banking-house is, and the only partner transacting the business, absent himself from the banking-house, shut it up, and stop payment, this is not evidence of a joint act of bankruptcy committed by him and the rest of the partners, who reside at a distance from the banking-house. (4)

**3. Commission.**

The next point, to be considered, relates to the proof of a commission regularly issued. To establish this, it will be necessary for the plaintiffs to produce the original commission under the great seal, and prove the petitioning creditor's debt. A writ of *supersedeas*, reciting that a commission of bankruptcy had issued, bearing date on a particular day, is evidence of the issuing of such commission, and also of the time of the issuing. (5)

The regular mode of issuing out a commission appears from the statute 5 G. 2. c. 30. s. 23., which enacts, for preventing the taking out of commissions of bankrupts maliciously, "that no commission of bankruptcy shall be awarded and issued out against any person whatsoever, upon the petition of one or more creditors, unless the single debt of the creditor, or of two or more persons being partners, petitioning for the same, amount to the sum of one hundred pounds or upwards; or unless the debt of two creditors, so petitioning,

(1) *Reed v. James*, 1 Starkie, N. P. C. 134.

(2) *Hopper v. Richmond*, 1 Stark. N. P. C. 507.

(3) *Wydown's case*, 14 Ves. 80. See *infra*, p. 336.

(4) *Mills v. Bennett*, 2 Maule & Selw. 556.

(5) *Gervis v. Propr. of Grand West. Canal*, 5 Maule & Selw. 76.



shall amount to one hundred and fifty pounds or upwards; or unless the debt of three or more creditors, so petitioning, shall amount to two hundred pounds or upwards: and the creditor or creditors, petitioning for such commission, shall, before the same shall be granted, make an affidavit, or a solemn affirmation in writing, before one of the masters of the Court of Chancery, (which oath or affirmation shall be filed with the proper officer,) of the truth and reality of such debt or debts; and likewise give bond to the Lord Chancellor, in the penalty of two hundred pounds, conditioned for proving his or their debts, as well before the commissioners named in such commission, as upon a trial at law, in case the due issuing forth of the same shall be contested and tried, and also for proving the party a bankrupt at the time of taking out such commission."

The forms of the modern practice in suing out a commission, are thus described by a writer on the subject of the bankrupt laws. (1) In the country, the petitioning creditor goes before a master extraordinary in chancery, and swears to the amount of his debt, and that he believes his debtor is become a bankrupt; and he executes the bond, and then both are sent to an agent in London: if the petitioning creditor resides in London, or in the vicinity, he may make his affidavit before a master in chancery: and the bond will not be received, unless it is executed at the bankrupt office. When the affidavit and the bond are delivered, in each case, at the office, and an entry is made in the docket-book, the petitioning creditor is said to have struck a docket. After the docket is struck, the solicitor within the next four days bespeaks the commission; he then pays the fees for it, and the clerks make out a petition, and procure for him a commission from the office of the patentee. They are tacked together, and at one corner of the petition the *fiat* is written, viz. "Let a commission issue as prayed, and be directed to, &c." The petition and commission are taken together to the chancellor, and he signs the *fiat*: and then

(1) First vol. of Mr. Christian's work on the Law of Bankruptcy, p. 244.

the commission is immediately sealed, either in private or at a public seal. The commission always bears date the day it is sealed; and that date is then entered under the column left for it in the docket book.

A commission of bankruptcy cannot be superseded on the ground, that the act of bankruptcy was posterior to the striking of the docket (1); even if the act of bankruptcy were committed on the same day, on which the commission issued, the commission would not on that account be deemed invalid; provided, upon enquiry, which it is competent to make, it should be ascertained by evidence; that the act was committed before the issuing, (that is, before the sealing,) of the commission. (1) It appears, indeed, in point of practice, that the person, who strikes the docket, makes an affidavit as to his belief, that the party had at that time committed an act of bankruptcy; but the statute does not require such an affidavit; nor is there in the bond any thing requiring the obligor to prove, that an act of bankruptcy had been committed at the date of the bond; and the language of the statute is satisfied, if the affidavit state, that the party was a bankrupt at the time of taking out, or issuing, the commission. (2)

A secret act of bankruptcy, prior to the petitioning creditor's debt, will not defeat a commission, except where the petitioning creditor knew of such secret act. At one time, indeed, the rule of law was, that an existing commission might be upset by proof of a prior bankruptcy. The principle, upon which this was decided, namely, that the party, who had committed the prior act of bankruptcy, was no longer a trader, has been thought very technical (3): and the rule was often productive of mischievous consequences, as a collusion between the bankrupt and any one creditor would effectually protect the bankrupt from a commission. (3) A late statute, therefore, (stat. 46 G. 3. c. 135. s. 5.) expressly enacts, that

(1) Wydown's case, 14 Ves. 80.  
88.

(2) 14 Ves. 80. 88.

(3) Bryant v. Withers, 2 Maule & Selw. 131.

no commission of bankrupt shall be avoided or defeated by reason of any act of bankruptcy committed by the person, against whom such commission shall have issued, prior to the contracting the debt of the creditor, upon whose petition such commission shall have issued, if such petitioning creditor had not any notice of such act of bankruptcy, at the time when the debt to him was contracted. . And the third section provides, that the issuing of a former commission of bankrupt, although it has been superseded, or the striking of a docket for the purpose of issuing such a commission, whether any commission shall have actually issued thereupon or not, is to be deemed notice of a prior act of bankruptcy for the purpose of this act. \*

The object of this statute was to protect commissions, which have been regularly sued out, from being defeated by an act of bankruptcy, committed prior to the contracting of the petitioning creditor's debt. But it will not give effect and validity to a commission, founded on a petitioning creditor's debt, which was not a legal subsisting debt at the time of the act of bankruptcy. (1)

In the excepted case above mentioned, namely, where the petitioning creditor has notice of the prior act of bankruptcy, the commission may still be set aside on proper proof, as it might before the statute. And, before the passing of that statute, in case such a defence had been set up, in an action brought by the assignees, it seems to have been necessary, not only to prove, that there was an act of bankruptcy prior

(1) *Moss v. Smith*, 1 Campb. 489.

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\* This section, it is to be observed, though it makes the striking of a docket sufficient notice of the prior act of bankruptcy, does not make it proof either of such prior act, or of a prior debt sufficient to support a commission. (a)

(a) *R. v. Bullock*, 1 Taunt. 71.

to the debt of the petitioning creditor, but also to prove a petitioning creditor's debt, existing at the time of such prior act of bankruptcy, and sufficient to sustain another commission (1); for, as it has been justly observed (2), unless there would be a different distribution under some other commission, the existing commission ought not to be disturbed.

The proof of a prior act of bankruptcy is not admissible, either in favour of the bankrupt himself, or in favour of a third person claiming under him by assignment, subsequent to the commission: for such assignee is not in a better situation than the bankrupt; and if the bankrupt could set aside a commission by proving a secret act of bankruptcy, he might recover from his assignees the whole amount of his property after

(1) See *Doe, dem. Hunter, v. see R. v. Bullock, 1 Taunt. 71. 77. Boulcot, 2 Esp. N. P. C. 595. Parker 88. 94.\* v. Manning, cited ib. 597. Miles v. (2) See 1st vol. of Mr. Christian's Rawlins, 4 Esp. N. P. C. 194. And Treatise on Bankrupt Law, p. 212*

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\* See also the case of *Beardmore* and another, assignees of a bankrupt, *v. Shaw* and another, Sheriff of London, 1 New Rep. 263. The Court of Common Pleas in this case determined, that a commission of bankruptcy might be avoided by proof of an act of bankruptcy, prior to that on which the commission was founded, together with proof of a debt, of the same date, sufficient to support a commission; although it appeared, that a former commission, sued out against the bankrupt, had been superseded on the application of all the creditors, and though one of those creditors, (whose debt was relied upon by the defendants in this case,) had proved the same debt under the second commission. Sir James Mansfield C. J., in delivering the judgment of the Court, said, "The only question is, whether this debt, having been proved under the present commission, affords a sufficient objection in law to the creditor's taking out a new commission. We cannot say, that the existing creditor, having proved his debt under the present commission, is thereby barred at law from taking out a new commission. We must consider, whether the commission was well founded, or not, at the time when it was issued; for, if not, it would be singular, that it should be made good by such a circumstance as the creditor proving under it. At the same time, it may be observed, that, if this had been the only subsisting debt under the old act of bankruptcy, and this debt had been paid or released before the trial, the commission might have been supported, and so the commission might have been made good by an act subsequent to the time of its being issued, though it were bad at the time when it was taken out."

distribution, which would have the effect of placing them in a situation of great peril. (1)

The assignees must prove the debt of the petitioning creditor, by the same evidence which would be necessary in an action by the creditor himself against the bankrupt. This is laid down by Mr. Justice Buller, in the case of *Abbot v. Plumbe* (2), as an established rule: and therefore in that case, where the debt arose on a bond, the Court determined, that the acknowledgment of the debt by the obligor (the bankrupt) would not supersede the necessity of calling the subscribing witness. So, if the debt of the petitioning creditor is on a bill of exchange, indorsed to him by the bankrupt, who drew the bill, it will be necessary, in order to prove the debt, to go regularly through the several proofs, as in an action against the drawer. For instance, it must be shown, that the drawer had sufficient notice of the dishonour of the bill, or that the notice of dishonour may, under the circumstances of the case, be dispensed with. For this purpose, namely, to dispense with proof of such a notice, an acknowledgment by the bankrupt, the drawer, in a conversation between him and the petitioning creditor, the indorsee or payee, that the bill would not be paid, but would come back to him, has been adjudged to be sufficient evidence, although this declaration was made after the act of bankruptcy. (3)

Proof of  
petitioning  
creditor's  
debt.

The debt must be a legal debt; such as would entitle the petitioning creditor to maintain an action at law for recovering it. One of several persons, to whom a joint bond has been given, cannot be the only petitioning creditor in support of a commission against the obligor; but the other parties ought to concur in the proceeding (4): this is implied by the words of the statute (5 G. 2. c. 30. s. 23.), which require, that the single debt of the creditor, or *of two or more persons*

(1) *Donovan, v. Duff*, 9 East, 21. (5) *Brett v. Levett*, 13 East, 215.  
*R. v. Bullock*, 1 Taunt. 94. *Bryant* (4) *Buckland v. Newsame*, 1 Taunt.  
*v. Withers*, 2 Maule & Selw. 125. 477. 1 Campb. 474.  
 (2) 1 Doug. 215.

*being partners*, petitioners for the commission, shall amount to the sum of 100*l*.

The petitioning creditor's debt must also be shown to have been a legal debt, due and subsisting at the time of the act of bankruptcy (1): it is not enough barely to prove, that it accrued before the suing out of the commission. If, therefore, the debt, relied upon, was on a sale of goods, and the goods were sold on credit, which did not expire before the act of bankruptcy, this would not be sufficient to support the commission. (2) For the same reason, a deposition taken before commissioners, which states merely, that the bankrupt is indebted to the petitioning creditor, and not that he was so indebted at the time of the act of bankruptcy, will not be sufficient evidence of the debt. (3) So, if an entry in the bankrupt's books (4), or an account signed by the bankrupt, in which he charges himself (5), is produced as evidence of the debt, the plaintiffs are bound to show, that the entry was made, or the account signed, at a time prior to the bankruptcy; and this must be proved by evidence extrinsic and independent of the writing. However, it will not be absolutely necessary to prove, that the debt continued from the period, when it was first contracted, down to the precise time of the act of bankruptcy; for, if it is shown to have once existed prior to the act, its continuance will be presumed. (6) And the date of a promissory note, which was

(1) *Toms v. Mytton*, 2 Str. 744. See *Bamford v. Burrell*, 2 Bos. & Ambrose v. Clendon, 2 Str. 1042. Pull. 1. The cases on this subject are collected in *Montague's Dig. Ex parte Charles*, 14 East, 197., referred to by the Court in *Buss v. Gilbert*, 2 Maule & Selw. 70. *Doe, dem. Hunter, v. Boulcot*, 2 Esp. N. P. C. 595. *Moss v. Smith*, 1 Campb. 489. *Lawson v. Robinson*, 1 Starkie, N. P. C. 456. There has been some difference of opinion on this point. In the case of *Glaister v. Hewer*, 7 T. R. 499., Lord Kenyon is reported to have said, that the time, at which the debt ought to be proved to exist, is the time of petitioning. However, the rule appears now to be settled, as stated in the text.

(2) *Moss v. Smith*, 1 Campb. 489.

(3) *Clarke v. Askew*, before Bayley J., 1816; and, on a motion for a new trial, the Court of K. B. were of the same opinion. See 1 Starkie, N. P. C. 458.

(4) *Ewer v. Preston*, Rep. temp. Hard. 578. *Watts v. Thorpe*, 1 Campb. 376.

(5) *Hoare v. Coryton*, 4 Taunt. 560.

(6) *Jackson v. Irvin*, 2 Campb. 50.

relied upon as the petitioning creditor's debt, being prior to the act of bankruptcy, has been considered as presumptive evidence, that the note existed before the act. (1) But if the petitioning creditor is the indorsee of a bill or note, the date of the instrument affords no presumption as to the commencement of the debt: it is the time of the indorsement in this case that is material; and that ought to be satisfactorily proved. (2)

The regular and formal proof of the trading, of the act of bankruptcy, of the issuing of the commission, and of the petitioning creditor's debt, will be dispensed with, if the defendant has, by his admissions or by his conduct, precluded himself from disputing the bankruptcy. (3) Thus, in the case of Maltby, assignee of Durouveray, v. Christie (4), (an action to recover the price of some goods, which the defendant had received from the trader before his bankruptcy, to sell by auction, and which he had sold after the bankruptcy,) Lord Kenyon ruled, that the defendant, having described the goods, in his catalogue of sale, as "the property of Durouveray, a bankrupt," had precluded himself from disputing the bankruptcy, and that the admission dispensed with the necessity of going through the different steps, as in ordinary cases. This, as Lord Ellenborough has observed since, in commenting upon the case (5), was an express declaration by the defendant, that Durouveray was a bankrupt, and imported, that the defendant was acting under his assignees, inasmuch as the bankruptcy would have countermanded any authority, which the bankrupt himself might have given for the sale. So, in the case of Dickenson, assignee of Booth, v. Coward (6), where it appeared, that the defendant, having purchased goods of the person, who was afterwards a bank-

Effect of admissions.

(1) *Taylor v. Kinloch*, 1 Starkie, N.P.C. 176. And the same point was mentioned at the bar, in that case, as having been so decided by Bayley J. on the Northern Circuit.

(2) *Rose v. Rowcroft*, 4 Campb. 245.

(3) See Vol. I. p. 228.

(4) 1 Esp. N.P.C. 340., cited and commented on, 16 East, 195.

(5) 16 East, 193.

(6) 1 Barn. & Ald. 677. No notice to dispute the proceedings had been given.

rupt, attended a meeting of the commissioners, and exhibited an account between him and the bankrupt, claiming certain deductions, and that he afterwards made a part-payment to the plaintiff, the Court of King's Bench were of opinion, that the defendant must be understood to have treated with the plaintiff as assignee, and that this was *primâ facie* evidence of his being assignee, without the production of the proceedings. Such evidence is not conclusive; and the defendant in answer may show, that he bore some other character: but any recognition of a person standing in a given relation to others, is *primâ facie* evidence against the person who makes such recognition, that the relation exists. (1) The mere circumstance, of a creditor having proved a debt under the commission is not sufficient to preclude him from disputing its validity (2); if, therefore, the assignees bring an action against him, and he gives notice of his intention to dispute the validity of the commission, they must regularly prove the petitioning creditor's debt, the trading, and act of bankruptcy, as in other cases.

The general nature of the proofs concerning the trading, the acts of bankruptcy, and the petitioning creditor's debt, having been considered, the next subject of enquiry relates to the proceedings of the commissioners, and the admissibility of witnesses.

4. Proceeding  
of commis-  
sioners.

5 G. 2. c. 30.

On the subject of the proceedings of the commissioners, the important statutes are, the 5th of G. 2. c. 30., and the 49th of G. 3. c. 121. The first of these acts (after reciting, that commissions of bankrupts, and depositions taken before the commissioners, and the proceedings on the commissions, are frequently lost and mislaid, to the great inconvenience of creditors, and that these proceedings, in case they could be produced, would not be of record, nor admissible in

(1) By Lord Ellenborough C. J. 191. See Vol. I. p. 106., where the  
(2) Rankin v. Horner, 16 East, ground of this decision is stated.



evidence (1,) enacts, that "upon petition of any person to the great seal, praying, that the commission and the depositions taken thereon, or any part of such depositions, and any other matter or thing relating to the commission or the proceedings thereon, may be entered of record, the great seal may direct them to be entered of record; and in case of the death of the witnesses proving the bankruptcy, or in case the commission, depositions, proceedings, or other matters or things, be lost or mislaid, a true copy of the record of such commission, deposition, proceedings, or other matters or things, signed and attested as therein mentioned, may upon all occasions be given in evidence to prove such commission, and the bankruptcy of the person, against whom the commission has been awarded, or other matters or things."

This statute, though it requires the copy of the record to be signed and attested, does not specify by whom, or in what manner, this is to be done. But as the statute proceeds in the same section (sect. 41.), to empower the Lord Chancellor to appoint a proper person, who is to enter the proceedings on record, and have the custody of the entries, it has been suggested, and with good reason, that this is the person, whose signature and attestation are required. (2) The statute, it may be observed, requires something more than a signed and attested copy: the copy, so signed and attested, must also be shown to be a true copy.

The depositions, when thus recorded, are evidence, in an action at law, to prove the precise time, when the act of bankruptcy was committed (3); "for the witness cannot tell his story before the commissioners, without saying when the act of bankruptcy was committed. He must mention that naturally and of course, and therefore is the more likely to speak the

(1) The depositions were not admissible before the statute, because, in the proceedings before the commissioners, the parties interested had not the power of cross-examining the

witnesses. 2 Roll. Ab. 679. pl. 9. Bull. N. P. 242.

(2) See 2d volume of Mr. Christian's work on the Bankrupt Law.

(3) *Janson v. Wilson*, 1 Doug. 257.

truth. In many cases, its being an act of bankruptcy depends on the time. The legislature considered the commissioners as indifferent persons, examining the witnesses with impartiality, and taking care of the interests of all parties." (1)

Proceedings  
in bankrupt  
cases under  
st. 49 G. 3.

The statute 49 G. 3. c. 121. s. 10. enacts, that, in all actions brought by or against assignees, the commission and the proceedings of the commissioners are to be received, as evidence of the petitioning creditor's debt, and of the trading and bankruptcy, unless the other party in the action, if defendant, at or before the time of pleading to the action, and, if plaintiff, before issue joined, give notice in writing to such assignee, that he intends to dispute the same. And by section 11. of the same act, in all suits in equity by or against assignees, the commission and proceedings are to be received, as evidence of the petitioning creditor's debt, and of the trading and bankruptcy, against all the other parties in the suit, unless such parties, some or one of them, within ten days after rejoinder in the cause, give notice in writing to the assignees, that they intend to dispute the same.

1. Evidence  
between what  
parties.

This statute applies only to those cases, where the assignees are parties to the action. In an action between third persons, if the validity of a commission of bankruptcy comes incidentally into question, as a ground of defence, it must be regularly proved, as it would have been before the passing of the statute. (2) But the statute is not confined to those cases only, where the assignees are named as such upon the record; and will apply equally, where the opposite party knows, that they make out their title under the commission. (3) Nor is the statute confined to the case, where the assignees are the only defendants on the record; if there are other co-defendants, who justify as servants of the assignees, the statute equally applies. (4)

(1) By *Ld. Mansfield*, 1 *Doug.* 257.

(2) *Doe*, *dem.* *Mawson v. Liston*, 4 *Taunt.* 741.

(3) *Simmonds v. Knight*, 5 *Campb.* 251.

(4) *Gilman v. Cousins* and others, 2 *Starkie*, N. P. C. 182., by *Bayley J.*

When the proceedings are offered in evidence, it will be sufficient to prove, that they came out of the proper custody, namely, that of the solicitor to the commission, or to prove the hand-writing of one of the commissioners, before whom they were taken. (1) Such evidence is necessary, although there has not been any notice of an intention to dispute their validity.

2. Custody of the proceedings.

The statute requires the notice, on the part of the plaintiff, to be given before issue joined. A notice, therefore, delivered at the time of delivering the issue with notice of trial, is plainly insufficient. (2) The notice, by the defendant, is to be given at or before the time of pleading; if he has omitted to give notice before pleading, the regular course is to apply to the Court for leave to withdraw his plea, and plead *de novo*; the last plea would then be considered the party's plea to all purposes, and a notice, given at the time of pleading such plea, is a sufficient compliance with the statute (3): but, without an application to the Court, he cannot regularly withdraw the plea, and deliver it again with a notice, though the time for pleading has not yet expired. (4) With respect to the serving of the notice, service on the assignee in person is not necessary; a delivery of the notice to the attorney of the party is the best for all practical uses, and will be sufficient; but it is not a good service, to deliver the notice to a servant at the dwelling-house of the assignee. (5) A notice, that the defendant means to dispute the validity of the commission, is not to be considered as part of his evidence in the cause, but may be proved at the beginning of the trial, and immediately calls on the plaintiff to support the commission, in the same manner as before the act passed. (6)

3. Service of notice.

(1) *Collinson v. Hilear*, 3 Campb. 30.

(2) *Richmond v. Heapy*, 4 Campb. 207.

(3) *Decharme v. Lane*, 2 Campb. 324.

(4) *Poole v. Bell*, Holt, N. P. C. 328.

(5) *Howard v. Ramsbottom*, 5 Taunt. 526.

(6) *Decharme v. Lane*, 2 Campb. 324.

4. Effect of proceedings, as evidence.

The words of the statute are, that the commission and the proceedings of the commissioners are to be received, *as evidence* of the several matters there specified, unless the other party give notice in writing, that he intends to dispute the same. If such notice is not given, the proceedings are *primâ facie* evidence; but not conclusive, as was at first supposed. (1) The bankrupt, in an action against the assignees, may call witnesses to contradict the depositions, respecting the petitioning creditor's debt, the trading or the bankruptcy, although he has not given such a notice to the assignees. (2)

The examination of a bankrupt before the commissioners is evidence against him, although the questions were improperly put to him with a view to the action (3), and though he might have demurred to them as exposing him to penalties. (4) If the witness, examined before the commissioners, has signed the examination after it was read to him, it must obviously be immaterial with respect to the question of admissibility, whether every word used by him was taken down, or only the substance of what appeared to be relevant. (5) And if he refers in his examination to a written document, as containing a statement of the facts to which he is questioned, that document may be read, as part of his examination. (6)

As the proceedings are made evidence by the statute, the deposition of the petitioning creditor is admissible evidence of the petitioning creditor's debt, though he himself would not have been a competent witness to support the commission. (7) And if a deposition state, that the deponent witnessed the party's execution of a deed, by which he assigned his property

(1) *Humphries v. Coggan*, 1812, 1 Rose, Bank. Cas. 226.

(2) *Ellis v. Shirley* 3 Campb. 424. *Jones v. Llewellyn*, 1 Merivale, 6. (a). *Mills v. Bennett*, 2 Maule & Sel. 556.

(3) *Stockfleth v. De Tastet*, 4 Campb. 10.

(4) *Smith v. Beadnell*, 1 Campb. 30.

(5) *Milward v. Forbes*, 4 Esp. N. P. C. 172.

(6) *Falconer v. Hanson*, 1 Campb. 171.

(7) *Bisse v. Randall*, 2 Campb. 493.

[ 4. ] *by or against Assignees of a Bankrupt.*

to A. B., (such a deed, as would be an act of bankruptcy,) this is evidence of the deed being executed, without the production of the deed. (1) Still, however, depositions may be objected to as defective and insufficient, in not proving the subject-matter to which they apply; as, where the deposition of the petitioning creditor states only, that the debt was due to him at and *before the time of suing forth the commission*, not showing, that it existed at the time of the act of bankruptcy, this has been held to be insufficient (2); and it is not necessary to give notice of an intention to dispute the proceedings, in order to take this objection. So also a deposition, stating, that the party absented himself on a certain day, and that he had declared to the deponent, that his motive for absenting himself was to avoid his creditors, but not stating the time when this declaration was made, is not a sufficient proof of an act of bankruptcy. (3)

In an action of assumpsit for a creditor's share, under an order of commissioners for a dividend, the proceedings of the commissioners are conclusive evidence of the debt, against the bankrupt's assignees (4): where the debt has been once liquidated before the commissioners, it cannot be litigated, except on an application to the great seal. But on an indictment for perjury, charged to have been committed by the defendant in passing his examination before the commissioners, strict evidence of the bankruptcy seems to be necessary, and the commission and proceedings under it will not be sufficient proof; for the authority of the commissioners, in taking the examination, is grounded, not in the commission, but in the bankruptcy. (5)

Only such of the depositions, as are read, are to be considered as given in evidence. The opposite party cannot

5. Right of inspecting the proceedings.

(1) *Kay v. Stead*, 2 Starkie, N.P.C. 300.; by Wood, B.

(3) *Clarke v. Askew*, 2 Starkie, N. P. C. 458., by Bayley J.; and the Court of K. B., on a motion for a new trial, were of the same opinion.

(2) *Marsh v. Meager*, 1 Starkie, N. P. C. 553.

(4) *Brown v. Bullen*, 1 Doug. 407.

(5) *R. v. Punshon*, 3 Campb. 96.

inspect any other deposition, for the purpose of cross-examining a witness; but he may afterwards call for that deposition, and read it in evidence for the purpose of contradicting him. (1) The proceedings are kept for the benefit of the creditors, and there is no right to inspect them as public documents.

3. Competency of witnesses.

The next point to be considered, relates to the admissibility of witnesses. And first, as to the competency of creditors :

Creditor.

A creditor of a bankrupt is not competent to increase the fund, out of which he may receive a dividend. (2) He cannot, therefore, give any evidence to deprive the bankrupt of his allowance. (2)

It was held in one case, that a creditor, who had not proved his debt under the commission, was competent to support the commission, though not to increase the estate (3); on the ground, that he had no immediate or certain benefit, and it might be as advantageous for the creditor to be allowed to sue his debtor, as a solvent person, as to receive a dividend under the commission. However, as a commission of bankruptcy passes the whole of the bankrupt's real as well as personal estate to the assignees, and appropriates immediately to the satisfaction of his debts that which can only be reached remotely and partially by the process of common law, it is in this respect a proceeding evidently favourable to the creditors: and therefore in a later case, on the trial of an issue, whether a person was a trader, a creditor, who had not proved, was not allowed to support the commission, under which he might afterwards prove and receive a dividend. (4) The Lord Chancellor has also determined, that a creditor is not competent to prove an act of bankruptcy at the opening of a commission: "It is not enough, that the creditor has not availed himself of the com-

(1) *Black v. Thorne*, 4 Campb. 104.

(2) 2 Campb. 301. *Shuttleworth v. Bravo*, 1 Str. 507.

(3) *Williams v. Stevens*, 2 Campb. 301., by Lord Ellenborough.

(4) *Adams v. Malkin*, 3 Campb. 543., by Lord Ch. J. Gibbs.

mission; it ought to be certain that he never will, in order to render him competent." (1) And Lord Ellenborough, who had been of a different opinion in the case above cited, held afterwards, in the case of *Crooke v. Edwards* (2), on the trial of an issue, that a creditor, who had not proved under the commission, was yet incompetent to prove an act of bankruptcy.

The petitioning creditor, though he may defeat a commission (3), or cut down his own debt (4), is not a competent witness to prove the commission regularly sued out (5); because he enters into a bond to the Lord Chancellor, conditioned to establish the several facts, upon which the validity of the commission depends, and to cause it to be effectually executed. However, the deposition of a petitioning creditor, taken before the commissioners, is admissible as proof of his debt, if there has not been notice of an intention to dispute the proceedings, though the creditor himself would not be a competent witness at the trial; for the st. 21 J. 1. c. 19. s. 9. (which authorises the commissioners to examine every person upon oath, for the discovery of the truth of the respective debts,) implies, that the petitioning creditor may be properly admitted before them to prove his debt at the opening of the commission; and the object of the statute 49 G. 3. c. 121. appears to have been, to make the depositions, by whomsoever sworn, sufficient evidence of the trading, of the act of bankruptcy, and the petitioning creditor's debt, unless notice be given, that the validity of the commission will be contested. (6)

In one species of bankruptcy, that committed by a member of parliament, (which was introduced by st. 4 G. 3. c. 33.) the act of bankruptcy must necessarily be proved, to a certain

(1) By the L. Chancellor, 1 Rose, 592. n.

(2) 2 Starkie, N. P. C. 302.

(3) 2 Campb. 412. In re Codd, 2 Scho. & Lef. 116.

(4) *Lloyd v. Stretton*, 1 Starkie, N. P. C. 40.

(5) *Green v. Jones*, 2 Campb. 411

(6) *Bisse v. Randall*, 2 Campb. 493.

extent, by a creditor; for the party is adjudged by the statute to be a bankrupt, unless, within two months after personal service of summons, he shall pay, secure, or compound for his debt to the satisfaction of his creditor, or enter into a bond prescribed by the statute; and the creditor is, in ordinary cases, the only person who can prove, that the debt has not been paid, secured, or compounded for, to his satisfaction. With reference to such negative circumstances, said Lord Eldon in a late case (1), "the evidence of a creditor must, in this particular act of bankruptcy, be admitted to that extent; but the necessity, which exacts this admission, limits the extent of it; and although you must admit him to prove what he alone can prove, yet he is not to be admitted to prove what can be established by the evidence of others. The circumstance, for example, of the bankrupt being a member of parliament and a banker, could have been derived from other sources, and ought not to have been left to depend upon the statement of the creditor, upon his statement, too, made in another court, and for another purpose."

Declaration of  
petitioning  
creditor.

The declarations and admissions of the petitioning creditor have been received as evidence, in actions against a sheriff, (who defends on the ground, that the party, with respect to whom the question arises, was a bankrupt,) for the purpose of showing the insufficiency of the petitioning creditor's debt. Thus, in the case of *Young v. Smith* (2), (which was an action against a sheriff for a false return of *nulla bona*, and the defence was, that, at the time of the levy, the party was a bankrupt,) the plaintiff was allowed to prove, by the admission of one of the petitioning creditors, who were partners, that their alleged debt was not a subsisting debt at the time of the act of bankruptcy, the debt having arisen from the sale and delivery of goods, which, as one of the creditors afterwards declared, had been sold on credit, and the credit had not expired, when the act of bankruptcy was committed. And in the case of *Dow-*

(1) *Ex parte Harcourt*, 2 Rose, (2) 6 Esp. N. P. C. 121.  
Bank. Cas. 205.



den v. Fowle (1) the same point was determined, in an action similar to the one last cited. It was proved, in this case, that the instructions for the defence had been given by the assignees, one of whom was the petitioning creditor; the plaintiff proposed to prove, in answer to the defendant's case, that, subsequently to the suing out of the commission, there had been a settlement of accounts between the bankrupt and the petitioning creditor, and the latter then acknowledged, that the balance, due to him at the time of the act of bankruptcy and subsequently, did not exceed the sum of eight pounds. The objection to the evidence proposed was, that what the petitioning creditor might have said or done subsequently to the commission, could not be admitted for the purpose of impeaching the commission, in an action against the sheriff. But Mr. Justice Dampier held, that as the assignees appeared to be the real parties to the action, the subsequent declaration of the petitioning creditor was admissible: "although he once swore to the existence of a debt of one hundred pounds, he might have found, upon a further investigation of the accounts, that he was mistaken."

A creditor, who releases his debt to the assignees, is competent to prove the act of bankruptcy, although the action is brought by the bankrupt, who disputes the commission (2); and a release to the assignees alone is sufficient. (3) Or if the creditor sell his debt to another person, and undertake to assign it when required, this will extinguish his interest and restore his competency (4): for though a debt cannot be assigned at law, yet an assignment would be valid in a court of equity; and, after the sale, the creditor is merely a naked legal trustee for the purchaser, and has no interest in the debt. If the witness is assignee under the commission as well as a creditor, a release of all his personal claims on the bankrupt's estate will

Creditor made competent.

(1) 4 Campb. 38., by Dampier J.

(2) Koopea v. Chapinan, Peake, N. P. C. 19.

(3) Ambrose v. Clendon, Rep. Temp. Hard. 267.

(4) Granger v. Furlong, 2 Black. Rep. 1275. Heath v. Hall, 4 Taunt. 326. The debt, in the first case, was sold for less than five shillings in the pound.

render him competent; for after such release he is in the situation of a mere trustee, whose trust is not coupled with any personal estate. (1)

#### Bankrupt.

A bankrupt is not a competent witness, in an action by his assignees, to prove property in himself or a debt due to himself, or in any other manner to increase the fund. (2) The amount of the allowance, that may be granted to the bankrupt, under the commission, will depend upon the clear amount of his estate recovered by the assignees (3); this is a direct and immediate interest. Nor can the bankrupt prove his own act of bankruptcy, or explain an equivocal act, or prove the petitioning creditor's debt, or any other part necessary to support the commission, not even after obtaining a certificate, and executing a release of his share in the surplus; for, if the commission is not good, the certificate and all the proceedings are void, and the bankrupt will be liable again to his debts, from which the certificate would discharge him. (4) For the same reason, he cannot be questioned as to any antecedent act of bankruptcy, either in his examination in chief or in his cross-examination. (5) And, on a second commission of bankruptcy, a certificated bankrupt cannot be a witness for the assignees under that commission, unless he has paid 15 shillings in the pound; for, in the event of his not making that payment under the second commission, his future effects are liable. (6)

In an action by the assignees, to recover money levied under an execution on a warrant of attorney, a bankrupt has been admitted to prove, that the defendant knew of his insolvency

(1) *Tomlinson v. Wilkes*, 3 Brod. & Bing. 397.

(2) *Ewens v. Gold*, Bull. N. P. 43. *Butler v. Cooke*, Cowp. 70. *Ex parte Burt*, 1 Maddock, Rep. 46.

(3) See st. 5 G. 2. c. 30. s. 7.

(4) *Cross v. Fox*, 2 H. Bl. 279. n. (a); *Flower v. Herbert*, ib. *Field v. Curtis*, 2 Str. 829. *Chapman v. Gardner*, 2 H. Bl. 279. *Hoffman v. Pitt*, 5 Esp. N.P.C. 22. — The case of

*Oxlade v. Perchard*, 1 Esp. N. P. C. 286., (in which case a bankrupt was admitted to explain a doubtful act of bankruptcy,) has in effect been overruled by the cases of *Hoffman v. Pitt*, and *Chapman v. Gardner*.

(5) *Wyatt v. Wilkinson*, 5 Esp. N. P. C. 187.; *Elson v. Brailey*, MS. case in 1 Selw. N. P. 239.

(6) St. 5 G. 2. c. 30. s. 9. *Keanet v. Greenwollers*, Peake, N. P. C. 3.

at the time when the execution was issued (1); "the rule," said Lord Ellenborough, "is restricted to evidence affirming or disaffirming the bankruptcy." And if the defendant calls the bankrupt as his witness, in a case where he is competent to give evidence, (as, to prove that the defendant was not indebted to the bankrupt), he waves all objection to his general competency; and the bankrupt may be cross-examined as to the requisites to support the commission. (2)

It is an established rule, that a bankrupt may be a witness to *diminish* the fund, though he has not obtained his certificate; because in so doing he speaks most manifestly against himself; for he may not only defeat his title to the benefit, which the law allows him, if the fund is of a certain amount, but he hazards the displeasure of all his other creditors. (3) In an action of *assumpsit*, therefore, for goods sold and delivered to the defendant, the Court of King's Bench determined, that a witness, who had been twice bankrupt, and had not obtained his certificate, was competent to prove, on the part of the defendant, that the goods had been delivered on his, and not on the defendant's, account (4); the direct tendency of such evidence being to diminish the fund. It has been very justly observed (5), that although it may be ostensibly against the debtor's interest to enlarge his debts, (which is the same thing in one sense, as to diminish his funds,) yet it may happen to be the bankrupt's interest, from an apprehension of the danger of his discharge being refused, to introduce some creditors who will carry him through all his difficulties. When any thing of this kind is attempted, the evidence of a witness in such a situation must be received with great jealousy.

A bankrupt, who has obtained his certificate, is rendered a competent witness, by giving to the assignees a release of his share in the surplus and in the dividends. (6) A general re-

Bankrupt  
made com-  
petent.

(1) *Reed v. James*, 1 Starkie, N. P. C. 134.

(2) *Assignees of Gill v. Woodmass*, MS. case, in Selw. N. P.

(3) By the Court in *Langden v. Walker*, cited Cowp. 70.

(4) *Butler v. Cooke*, Cowp. 70.

(5) Bell's Commentaries on the Commercial Laws of Scotland, 1 vol. 493. Sect. (1126).

(6) *Ewens v. Gold*, Bull. N. P. 43.

lease to his assignees will be sufficient. (1) But no release can make the bankrupt a witness to prove his own act of bankruptcy. (2) And, after a second bankruptcy, he cannot be a witness, though he is certificated and has given a release, to increase the fund, unless he has paid fifteen shillings in the pound; for, in the event of his not making that payment under the second commission, his future effects are liable. (3)

Wife of bankrupt. As the bankrupt is not competent to support the commission, so neither is the bankrupt's wife; for an unity of interest subsists between them. The stat. of 21 Jac. 1. c. 19. s. 5. & 6., which empowers the commissioners to examine the wife, implies, that, without such statutory provision, she would not have been competent to give evidence.

In an action by assignees to recover a promissory note, which had been paid by the bankrupt into the hands of the defendants, who were bankers, (the balance on the general account between them and the bankrupt being against the latter,) the wife of the bankrupt was called by the plaintiffs, to prove, that the note had been paid in contemplation of bankruptcy; and, on an objection taken to her competency, as interested for her husband to increase the dividend, Lord Kenyon held, that she was indifferent in point of interest; since, if the plaintiffs recovered in this action, the defendants would be creditors against the bankrupt's estate to the amount of the note. (4) However, it may be observed, if the bankrupt's property would not pay twenty shillings in the pound, the witness had a greater interest on the side of the plaintiffs than on that of the defendant; for, in case the plaintiffs should recover, the defendants would have to pay the whole amount of the note; and though they might afterwards, as

(1) *Nares v. Saxby*, cited 2 T. R. 497.

(2) *Field v. Curtis*, 2 Str. 829.

(3) By st. 5 G. 2. c. 30. s. 9. *Kennett v. Greenwollers*, Peake, N. P. C. 3.

(4) *Jourdain v. Lefevre and others*, 1 Esp. N. P. C. 66. See the observations on this case in *Christian's Treat. on the Bank. L. vol. i.*

creditors, prove a debt to that amount, they would not receive the whole; and what they lose, the dividends would gain; so that the general fund would be more increased by the addition of the amount of the note, than it would be diminished by the deduction of the dividend paid to the defendants; and the higher the dividends are, the greater will be the allowance of the bankrupt; and the greater, consequently, the interest of the bankrupt's wife.

Declarations by the bankrupt, made before his bankruptcy, in which he states, that a debt was owing from him to the petitioning creditor, are admissible in evidence, as an admission of a debt. Upon the same principle, entries to that effect in the bankrupt's book, clearly proved to have been made before the act of bankruptcy, are admissible. (1) But proof of an admission of a debt, made after the act of bankruptcy, cannot be received as evidence, in an action by the assignees against a third person. (2) Such an admission would, indeed, be evidence against the bankrupt himself, in an action brought by him against an assignee, to try the validity of the commission: in that action, therefore, proof of the bankrupt's conduct and demeanour, in the investigation of accounts before the commissioners, is admissible evidence against him, as an admission of the petitioning creditor's debt. (3)

Declarations  
of bankrupt.

An acknowledgement by the bankrupt, the drawer of a bill of exchange, in a conversation between him and the petitioning creditor, (to whom the bill had been indorsed,) that the bill would not be paid by him, but that it would come back, is sufficient to dispense with proof of notice of the dishonour of the bill, although the conversation took place after the act of bankruptcy. (4) In order to establish such a debt of the petitioning creditor, it would be necessary to prove a notice, to the

(1) *Watts v. Thorpe*, 1 Campb. 376. *Downton v. Cross*, 1 Esp. N. P. C. 167. *Hoare v. Coryton*, 4 Taunt. 550.

(2) *Robson v. Kemp*, 4 Esp. N. P. C. 233.

(3) *Jarrett v. Leonard*, 2 Maule & Selw. 265.

(4) *Brett v. Levett*, 13 East, 213.

drawer, of the dishonour of the bill, or at least to show, that the notice might be dispensed with; and such a declaration of the bankrupt, even after his act of bankruptcy, is admissible, to show, that he had dispensed with the notice, and will make the ordinary and formal proof unnecessary.

The declarations of the trader at the time of his departing from his dwelling-house or of his absenting himself, are properly received in evidence, as showing the motive of his absence; for it is the intent, with which he departed from his dwelling-house, that constitutes the act of bankruptcy. (1) An admission by the bankrupt, during his absence from his dwelling-house, that he has absented himself to avoid his creditors, is good evidence: so is an admission of the same kind, in preparing to depart from home, or in the act of returning. The time when the declaration was made, is most material; and if the particular time is not clearly proved, the declaration is not admissible. (2) In strictness, the declaration ought to accompany the act; or, at least, if not precisely contemporaneous, it should be so connected with the act, that it may properly be considered as the result and consequence of the co-existing motives (3): but even this is admitting of some latitude in the construction of the rule, and to a greater extent, perhaps, than courts of law would at present be disposed to allow. The general rule, and the most correct rule, appears to be, that the declarations of a bankrupt, made *at any time* after the act, cannot be admitted to explain an antecedent absence or any other past transaction, which at the time of making the declarations was completely finished. (4) To admit such declarations would be in effect to receive an admission by the bankrupt, that he had committed an act of bankruptcy; a fact, which the bankrupt himself would not be allowed to prove; and yet, as was suggested in the argument

(1) *Ambrose v. Clendon*, Rep. Temp. Hard. 267. *Maylin v. Eyloe*, 2 Str. 809. *Ewens v. Gold*, Bull. N. P. 40. *Bateman v. Bailey*, 5 T. R. 512. *Ex parte Hague*, 1 Roscs' Bankrupt Ca. 150.

(2) *Marsh v. Meager*, 1 Starkie, N. P. C. 353.

(3) See *Bateman v. Bailey*, 5 T. R. 512.

(4) *Robson v. Kemp*, 4 Esp. N. P. C. 233.

in the case of *Bateman v. Bailey* (1), it would be much less dangerous to hear the bankrupt's own account upon his oath, than his bare relation to third persons at second hand.

The bankrupt is not divested of his property until an assignment is executed; when the assignment is once made, it vests the personal property in the assignees from the time of the bankruptcy. (2) This assignment is to be proved in the regular manner, by producing the deed, and proving the execution by the commissioners. Assignment.

But this doctrine of relation has been considered as applicable only to the assignment of the personal property, and not to extend to the conveyance of the freehold property of the bankrupt. In an action of ejectment, therefore, where the demise was laid after the date of the commission, but before the general assignment, and also before the bargain and sale of the lands in question to the assignees (the lessors of the plaintiff,) the Court of King's Bench held, that the plaintiff was not entitled to recover. (3) The Court enquired, as the report states, if there was any authority extending the doctrine of relation to the conveyance of the bankrupt's freehold; and, no authority being cited, they said, that it remained in the bankrupt, though not beneficially, until taken out of him by the conveyance.

(1) 5 T. R. 515.

(3) *Doe, dem. Esdaile, v. Mitchell*,

(2) *Case of Bankrupts*, 2 Rep. 2 Maule & Selw. 446. \*  
26. a.

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\* The statute of Elizabeth (st. 13 El. c. 7. s. 2.) gives the commissioners, or the greater part of them, power by deed indented, enrolled in one of the king's courts of record, to make sale of the lands, tenements, and hereditaments belonging to such debtor; and provides also, that every direction, order, bargain, sale, and other things, done by the person so authorised, shall be good and effectual, to all intents and purposes, against the said offender, debtor, &c., and against all other persons claiming by or under such debtor by any act done after such person shall become bankrupt

The deed indented must appear also to have been enrolled; the statute, above mentioned, expressly requires enrolment; the commissioners are invested with a power, which must be executed in the manner prescribed, or it will have no effect in passing the estate. (1) Lastly, the deed must be enrolled within six months after the date of the deed, according to the express provision of the act of parliament, relating to the enrolment of bargains and sales.\* The execution of the deed of bargain and sale is to be proved in the regular manner. (2) A bargain and sale of freehold lands may also be proved by an examined copy of the enrolment, signed by the proper officer. (3) A certificate on the bargain and sale, signed by the officer, whose duty it is to enrol such deeds, will be evidence of its enrolment, and of the time when it was enrolled. (4) The time of enrolment may be proved also by an examined copy of the officer's indorsement on the enrolled deed; and since the enrolled deed is a record, and the indorsement of the time, as well as of the fact, of enrolment is part of the record, the indorsement will be conclusive as to the time. (5)

(1) *Perry v. Bowes*, *Sr. T. Jones*, 56. 58. *The King in aid of Reed v. 196. Bennet v. Gandy*, *Carth.* 178. *Hopper*, 3 *Price*, 495. and see *Vol. I. Elliott v. Danby*, 12 *Mod.* 3. 485.

(2) See *Vol. I.* 462.

(3) See *Vol. I.* 481.

(4) *Kinnerley v. Orpe*, 1 *Doug.*

(5) *The King in aid of Reed v. Hopper*, 3 *Price*, 495.

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\* The st. 27 Hen. 8. c. 16. enacts, that no manors, lands, &c. shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall take effect, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and enrolled in one of the king's courts of record, or else within the county or counties, where the said lands, &c. lie, before the custos rotulorum and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; and the same enrolment to be had and made within six months next after the date of the same writings indented.



## CHAP. V.

*Of Evidence in Actions by or against Executors or Administrators.*

**FIRST**, of evidence in an action by an executor or administrator.

If an executor bring an action for a thing, which he demands in right of his testator, he ought to name himself executor (1); and an administrator ought to name himself administrator, when he makes the demand in right of his intestate. In such actions, brought in right of the deceased, if the defendant plead the general issue, without pleading in abatement, that the plaintiff is not executor or administrator, the plaintiff will not be obliged to prove himself invested with the character in which he claims, nor will the defendant be allowed to controvert his title to recover. Thus in an action of trover, brought by the plaintiff as administrator, on the possession of the deceased, and for a conversion in his lifetime, if the defendant plead the general issue, the plaintiff would have only to prove the property in the deceased, and a conversion by the defendant; he need not prove himself administrator, for that is admitted on the record, and the defendant cannot now contest that point. Lord Holt, therefore, held in such a case, that the defendant could not be admitted to prove, under the general issue, that the supposed intestate had made a will, appointing another person his executor. (2) Nor can the defendant prove, under the general issue, that there is another executor living besides the plaintiff; this also being matter of a plea in abatement. (3) So if the plaintiff

(1) Com. Dig. title Pleader. (3) Com. Dig. title Abatement.  
(2 D. 1.) (E. 13.)

(2) *Marsfield v. March*, 2 Lord Raym. 824.

sue as executor, on a breach of covenant in a lease, charged to have been committed in the time of the testator, and the defendant plead *non est factum*, or that he has not broken the covenants in the lease, this is an admission, on the record, of the plaintiff's title to sue. Or if the plaintiff sue as administrator, in an action of assumpsit on promises to the intestate, and make a profert of the letters of administration, the plea of *non assumpsit* admits the title of administrator, so that the letters need not be produced (1); and, if they are produced, the defendant cannot object to them as not properly stamped. (2)

Where the plaintiff brings an action in his own right, he need not name himself executor or administrator, or make profert of the letters testamentary (3): and if he so names himself, when the suit is in his own right, it will be merely surplusage. (4) But if the plaintiff claim property in goods as executor or administrator, he must prove his title as such, though he sue in his own right; and it will be competent to the defendant, under the general issue, to controvert his title. Thus, if the plaintiff in an action of trover declare upon property in himself, and it appears in evidence, that he claims the goods as administrator to J. S. &c., proof that J. S. has made a will, appointing an executor, would be a bar to the plaintiff, because it would defeat his property, upon which his action is founded. (5) Or if the plaintiff declare in trover as administrator, upon a conversion in his own time, he must prove himself to be such: the question is raised by the plea of *not guilty* in trover, which goes to the foundation of the plaintiff's title; and the want of administration need not therefore be specially pleaded. (6)

Proof of  
executor.

Although the executor derives his title from the will by which he is appointed, and not from the probate of the will,

(1) *Watson v. King*, 4 Campb. 272.

(3) *Thynne v. Prothero*, 2 Maule & Selw. 553.

(5) *Com. Dig. tit. Pleader*, (2D. 1.)

(4) *Com. Dig. tit. Pleader*, (2D. 1.)

(5) By Lord Holt, in *Marsfield v. Marsh*, 2 Ld. Raym. 824.

(6) By Lawrence J. in *Hunt v. Stevens*, 3 Taunt. 115.

yet it is the probate alone, which authenticates his right; and the probate is the only legitimate evidence of personal property being vested in an executor, or of the executor's appointment. (1) An examined copy of the probate is evidence of the person, there named, being executor. (2) But an examined copy of the will is not evidence of that fact; nor can the original will itself be read in evidence, unless it bear the seal of the spiritual court, or some other mark of authentication. (2) If the probate has been lost, an exemplification of it from the records of the spiritual court will be evidence of the will having been proved. (2)

A probate under the seal of the ordinary unrevoked, is conclusive as to the appointment of executor and the contents of the will; and cannot be impeached by evidence in the courts of common law. (3) Proof, that the will was forged, or that the testator was insane, is therefore not admissible. (3) But the defendant may show, (if the nature of his plea allow him to enter into such proof,) that the seal attached to the supposed probate has been forged (4), or that the supposed testator is still alive, or that the letters testamentary have been revoked and annulled.

The title of the plaintiff, as administrator, may be proved by the letters of administration; or by the original book of acts, which directs the grant of letters of administration, with the surrogate's fiat (5); or by an examined copy of the entry in such original book. The letters of administration must be properly stamped, or they are absolutely void; if it appear, therefore, that the plaintiff sues as administrator for a greater value, than is covered by the *ad valorem* stamp of the letters of administration, he cannot recover in the action (6),

Proof of administrator.

(1) See Vol. I. p. 342.

(2) Vol. I. p. 397.

(3) Vol. I. p. 342. As to the proof of the revocation of a probate, see *ib.* p. 398.

(4) 1 Stra. 671.

(5) See Vol. I. p. 399.

(6) Hunt v. Stevens, 5 Taunt. 113.

The amount of the stamp was proved by a copy of the bond given to the ordinary, entered in the books of the officer of the Prerogative Court.

provided the proof of his being administrator is a necessary part of his case. (1)

**Statute of limitations.**

If the declaration, in an action of assumpsit, charge the defendant on promises made to the testator, and not on any promise made to the plaintiff, and the defendant plead the statute of limitations, upon which issue is joined, the plaintiff will not be allowed to prove a promise made to himself by the defendant within six years (2), or an acknowledgment of the debt by the defendant after the testator's death. (3) The proof of a promise to the plaintiff is manifestly inapplicable to a declaration, which only charges a promise to the testator; and an acknowledgment of the debt, though it imply a promise to pay, can only imply such promise to a person living at the time, when the acknowledgment is made, and cannot refer back to the period before the testator's death.

Secondly, of evidence in an action against an executor or administrator.

**Plea of non executor.**

If the defendant intend to controvert the fact of his being executor or administrator, he ought to plead that he is not such: unless he pleads this matter specially, he admits himself to be executor or administrator, as charged in the declaration; and the point cannot afterwards be contested at the trial of the cause. But if the defendant plead in bar of the action, that he is not executor, or that he is not administrator, in that case the plaintiff will have to prove the affirmative of the proposition.

Proof that the defendant has intermeddled with the property of the deceased, so as to make himself executor *de son tort*, is sufficient proof of his being executor, and will

(1) See ante, p. 359.

(2) *Dean (or Green) v. Crane*, on a conference of all the Judges, 6 Mod.

309. 2 Ld. Raym. 1101. *Short v. McCarthy*, 3 Barn. & Ald. 626. 631.

(3) *Sarell v. Wine*, 5 East, 409.

render him chargeable as such. The instances, most commonly mentioned, by which a person makes himself executor *de son tort*, are such as taking possession of the goods of the deceased and converting them to one's own use, paying the debts of the deceased out of his assets, receiving or releasing debts due to the deceased, answering as executor in a suit (1), and other acts of the same kind; such acts directly affect the interest of the creditors, and they are characteristic of an executor. But the defendant will not be involved in the charge of an executorship by such an act as ordering the funeral of the deceased, or taking an inventory of his effects, or paying out of his own money the debts of the deceased or any part of the legacies (2); for these are rather the acts of kindness or charity than any assumption of the office of executor.

The formal and documentary proof of being executor or administrator has been before briefly mentioned. For the purpose of introducing such evidence, it may be always prudent, but it is not always necessary, to give notice to the defendant to produce at the trial the probate of the will or the letters of administration. In the case of *Davis v. Lady El. Williams* (3), (where an examined copy of an entry in the act-book, in the registry of the prerogative court, stating that administration had been granted at a certain time to Lady El. Williams, was received as proof of the fact of her being administratrix,) a previous notice to produce the letters of administration was considered to be unnecessary; the proof there offered was clearly not of a secondary or inferior nature, and would be good primary evidence even on behalf of the person, described in the entry, in support of his claim as administrator. In the case of *Gorton against Dyson* and another, sued as executors of J. H. (4), (where,

(1) 3 Bac. Ab. tit. Executor, 21.  
Toller's Law of Executor, ch. 2.  
sec. 2.

(2) 3 Bac. Ab. p. 22

(3) 13 East, 234.

(4) 1 Broderip and Bingham's Rep.  
C. P. 219.

for the purpose of proving an acknowledgment by J. H. in his will, of his having received a sum of money, for which the action was brought, it became material to prove the contents of the will,) an officer of the Ecclesiastical Court produced a document, purporting to be the original will of J. H., under the seal of the Ecclesiastical Court; and there was an indorsement on the will, by the officer of the Ecclesiastical Court, purporting that probate had been granted to the defendants upon it as the will of J. H., and that the defendants had accordingly sworn to the value of the effects (1); this evidence was held by the Court of Common Pleas to have been properly admitted. A notice to produce the probate of the will, it may be observed, had in this case been given to the defendant. But even without such notice, it seems, the evidence would have been admissible for the purpose, for which it was produced; for since the defendants had obtained probate on this document, and had thus acted upon it as the will of J. H., the document would be admissible against them, after such an admission, as the genuine writing of the testator. (2)

Although proof of a notice, to produce the probate or letters of administration, is necessary, before secondary evidence of them can be received; yet it will not be previously necessary to prove also, that the probate or letters are in the defendant's possession; for if he has been duly appointed executor or administrator, they must necessarily be presumed to be in his possession: and the notice to produce them, therefore, will at once enable the plaintiff to give secondary evidence of the defendant's appointment. Some proof of the identity of the party, namely, that the person, described in the documentary evidence as executor or administrator, is the party sued, will be indispensably necessary.

(1) See p. 221. of the report.

(2) See the opinion of Richardson J. p. 221.

If the defendant plead in bar, that he had not in his possession, at the time of the commencement of the suit, nor has had at any time since, any goods of the deceased to be administered, and the plaintiff reply, that the defendant had goods, &c. in his possession at that time, upon which the parties join issue, here the burthen of proof will be on the plaintiff, who ought to prove assets in the possession of the defendant either before or at the time alleged. He cannot prove under this issue, that assets have been received subsequently to the commencement of the suit; to be admitted into such proof, he should have replied this matter specially. (1) In addition also to the proof of assets, it will be necessary for the plaintiff, in an action of assumpsit, to prove the amount of the debt, which he seeks to recover; for though the plea admits some debt, it does not admit the amount. But the rule is different in an action of debt, where a specific debt is demanded; as, in an action of debt, if the defendant plead *plene administravit*, without also pleading *nil debet*, there the debt is admitted by the plea, and need not be proved. (2)

Plea of *plene administravit*. \*

An inventory of the goods of the deceased, which has been delivered by the defendant to the Spiritual Court, is evidence against him as proof of assets; and it will be competent to the plaintiff to prove, that the goods, comprised in the inventory, have been undervalued. (3) If the inventory produced does not distinguish, in the article concerning debts, between the desperate and such as are sperate, it will be sufficient to charge the executor with the whole as *prima facie* assets; and this will call upon him to prove any

(1) 6 T. R. 10.

(2) *Saunderson v. Nicholle*, 1 Show.

81. *Shelly's case*, 1 Salk. 296

Bull. N. P. 140.

(3) Bull. N. P. 140.

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\* This plea is a complete answer to the action; so that if the issue on this plea is found for the defendant, he will be entitled to the *general costs* of the action, though he should fail on other pleas pleaded by him in bar. *Edwards v. Bethel*, 1 Barn. & Ald. 254. *Ragg v. Wells*, 8 Taunt. 129. S. P.

of them desperate. (1) An admission by the defendant that a debt is a just debt, or a promise to pay it as soon as he can, is not evidence to charge him with assets (2): such an admission, said the Court, must be understood with a reasonable intendment, and the executor could not mean to pledge himself to commit a *devastavit* by paying this debt before others of a higher nature. Or, if an administrator submit to an arbitration respecting the amount of a debt, supposed to be due from the intestate, such a submission is not an admission of assets. (3) Nor will an executor admit assets by paying interest on a bond due from the testator (4): it would be unreasonable, that he should be liable for the whole debt, by paying a part out of his own funds, or that, because he has enough in his hands to pay the interest, he should be thereby concluded from disputing assets for the principal.

In answer to the proof of assets, the defendant may show, under the issue joined on the plea of *plene administravit*, that he has exhausted the assets, by discharging other debts of the deceased, not inferior in their nature to that of the plaintiff. In an action, therefore, on a judgment recovered against the deceased, to which the defendant pleaded *plene administravit*, and at the trial the plaintiff did not prove, that the judgment had been docketed, in pursuance of the st. 4 & 5 W. & M. c. 20., the defendant was allowed to prove payment of bond-debts to the extent of the assets (5); for the statute of W. & M. expressly enacts, that judgments, not docketed in the manner therein mentioned, shall not affect lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in their administration of the estates of their ancestors, testators, or intestates; so that all such judgments are put on the footing of simple contract debts. And, for this rea-

(1) Bull. N. P. 140.

(2) Hindsley v. Russell, 12 East, 252.

(3) Pearson v. Henry, 5 T. R. 6.

(4) Cleverly v. Brett, cited by Buller J., 5 T. R. 8.

(5) Hickey v. Hayter, 6 T. R. 384.



son, the defendant in the last cited case might have proved payment of debts on simple contract, as well as debts by specialty. But if the action were upon a bond, the defendant could not prove payment of simple contract debts, under the plea of *plenè administravit*, though he may not have had notice of the bond debt; but he ought to plead, that such payments have been made without notice, because bonds are still on the same footing as before the statute. (1)

If the action is *assumpsit*, and the debt, which the defendant has paid, is one by simple contract, the creditor himself is competent to prove it: he may also prove his receipt of the money from the defendant. If the action is brought upon a bond of the deceased, and the defendant would prove payment of other bond-debts in the course of administration of assets, he ought to prove the execution of those bonds in the regular manner, by proof of the sealing and delivery; and if there is a subscribing witness, the bond creditor would not be competent to prove the execution, though he may prove the payment of money upon the bond, and that he delivered it up to the defendant. (2) But if the debt, which has been paid, is a bond-debt, and the action against the executor is *assumpsit* on a simple contract, there, it is said, the proof of payment is sufficient, without proof of the sealing and delivery of the bond; and the reason given is, that if there is no bond, yet in this action the administration will be good (3); and in such case, says Mr. Justice Buller (4), the creditor may prove his bond, and the debt due upon it, and the payment of it.

(1) See 6 T. R. 388., by Lawrence J.

(2) See Vol. I. 462. In the case of *Kingston v. Grey*, 1 Lord Raym. 745., the report states, that "a creditor was admitted by Lord Holt C. J. to prove his bond, and the debt due upon it, upon *plenè administravit*, he having before received of the administrator, and delivered up the bond." This is the whole of the

report; from which it does not appear, whether the action against the defendant was *assumpsit*, or whether debt upon bond; nor does it appear, whether the execution of the bond was attested by a subscribing witness.

(3) *Saunderson v. Nicholle*, 1 Show. 81. Bull. N. P. 143.

(4) Bull. N. P. 143. citing 1 Raym. 745. See *suprà*. (2)

The defendant may show, under the plea of *plenè administravit*, that he has paid out of his own money to the amount of the value of the assets in his possession (1); and he may retain assets to such amount, provided he has made the payment, in discharge of debts not inferior in their kind to the debt of the plaintiff, and before the commencement of the plaintiff's action. He may also prove, under this plea, subsisting judgment debts, and retain assets to the full amount. (2) But he cannot give evidence of payments made by him subsequently to the commencement of the action (3); if he has made such payments without notice, he ought to plead, that he had not any notice of the plaintiff's debts until such a day, and *plenè administravit* before that day. (3) An executor *de son tort* cannot retain for his own debt, though it may be of a superior nature (4); but he may prove, under the plea of *plenè administravit*, that he delivered over the goods to the rightful administrator before the action was brought. (5)

If an executor plead *plenè administravit*, and the plaintiff reply, that he sued out his original on such a day, and that the defendant had assets then; and the defendant in his rejoinder takes issue, that he had not assets then: the plaintiff need not give in evidence a copy of the original, to prove the time of its being taken out, because the defendant admits it by his rejoinder. But if the plaintiff reply assets at the time of exhibiting his bill, namely, on such a day, and conclude his replication to the country, as in such case he may, there, although the plaintiff states his bill to have been exhibited on the first day of the term, yet if, in fact, it was exhibited afterwards, the defendant may take advantage of this on the evidence, so that he shall not be bound for

(1) Co. Litt. 283. a. Bull. N. P. 140. Jenkins Cent. p. 188. Cas. 88.

(2) Bond v. Green, Brownl. 75.

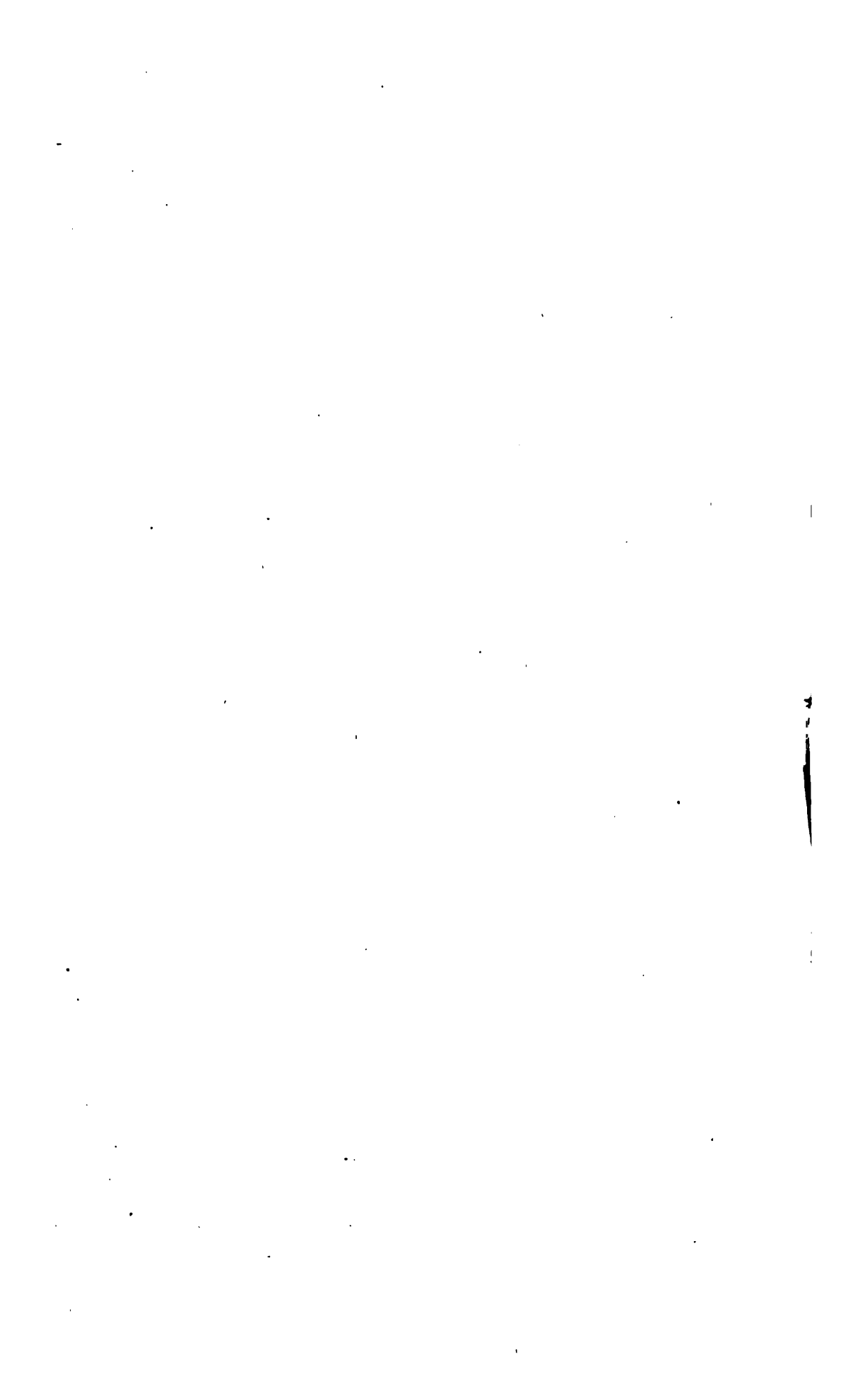
(3) Dyer, 52. a. Com. Dig. title Administrator. (C. 2.) *ad fin.*

(4) Curtis v. Palmer, 3 T. R. 587.

(5) 1 Salk. 313. 3 T. R. 590.

what he paid before. (1) The difference between these two cases, says Mr. Justice Buller, depends solely on the manner of the plaintiff's replying; for, in the first case, the plaintiff alleged the time of suing out the original, as a distinct positive fact, and concluded with an averment; and so the defendant was at liberty to take issue in his rejoinder on the time of the issuing of the original, or on his having assets: but, in the last case, the defendant had no opportunity of putting in issue the time of exhibiting the bill; but was obliged to join in the issue taken by the plaintiff, that the defendant had assets on the day when the plaintiff exhibited his bill, and the day mentioned in the replication, being alleged under a *videlicet*, is totally immaterial.

(1) Bull. N. P. 144.



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## ADDENDA.

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The following cases have occurred too late for insertion in the body of the Work.

*Vol. I. p. 7. n. (3).*

Add to the cases, here cited, the case of *Severn v. Olive*, Mich. Term, 1821. C. P. 3 Brod. and Bing. 72.

*Vol. I. p. 75. n. (4).*

In the case of *Mant v. Manwaring* and others, 7 Taunt. 139. the Court of Common Pleas determined, in an action on a joint contract against several partners, that one of the defendants was not competent, without the consent of the other defendants, to prove the partnership between himself and them, although he had suffered judgment by default, and had been released by the plaintiff, as to all other actions excepting the one then under trial.

*Vol. I. p. 157. line 16.*

The case of *Doe on the demise of Fenwick v. Reed*, has been lately decided, on the subject of the presumption of grants, &c. from the fact of continued possession. The defendants in that case claimed under a person, who was put into the possession of the estates in 1752, in satisfaction of a debt owing to him from E. C., the owner of the property, under whom the lessor of the plaintiff now claimed; and that person's family had retained possession from that time. It was proved also, that the title deeds, relating to the estates, still continued in E. C.'s family, and that moduses had been paid in 1779 for several estates, including the estates in question. The Court of King's Bench determined, that the question had been

properly left to the jury, to consider, whether they believed, that, in fact, any conveyance of the property had ever been made to the person, under whom the defendants claimed.

*Vol. I. p. 214. n. (2).*

Add the case of *Philips v. Shaw*, 4 Barn. and Ald. 435.

*Vol. I. p. 216. n. (6).*

Add the case of the *King v. Glossop*, 4 Barn. and Ald. 616.

*Vol. I. p. 256, 257.*

The case of *Goss v. Watlington* (Mich. Term, 1821. C. P. 3 Brod. and Bing. 192.) affords another example, as to the admissibility of written entries made by a person, since deceased. This was an action against a surety of A. B. deceased, on a bond conditioned for the due performance of duty by A. B., as collector of rates, &c., and for his delivering up to his employer all books and accounts, entrusted to his care as such collector. For the purpose of proving the receipt of money by the collector, certain books were produced, which had been delivered to him from his predecessor, and which on the death of A. B. were delivered over to his successor: these books contained entries of persons rated, and, opposite the names, the amount of the respective rates; many of the names were ticked off, that is, a mark was made near the names, by which mark the collector indicated, that he had received the sum assessed. Receipts, also, signed by the deceased collector, for money paid to him in his official capacity, were produced. On the first point, the Court of Common Pleas were of opinion, that the entries made by a deceased collector, charging himself with the receipt of money, and made by him in the public books of his office, for the faithful delivery of which books the defendant was surety, were admissible in evidence against the surety. Upon the second point, namely, the admissibility of the receipts, the Court thought, there was not enough, in the circumstances of the case, to admit the receipts in evidence against the defendant.

*Vol. I. p. 259. l. 6.*

*Doe on the demise of Human v. Pettett*, 5 Barn. & Ald. 223. The lessor of the plaintiff claimed under I. N., the original purchaser of the premises in question, after whose death his widow continued in possession about 30 years, and died in possession. The defendant claimed as her heir at law. The declarations of the widow, made during her possession, were admitted at the trial, as evidence to explain the nature of her possession, and to show that it was not adverse. The Court of King's Bench, on a motion for a new trial, held, that these declarations had been properly received.

*Vol. I. p. 406. l. 10.*

Articles of capitulation, on the surrender of an island, may be proved by a gazette, which contains the articles. General Picton's case, 30th Howell's State Trials, 493.

*Vol. I. p. 423.*

A question arose, on the impeachment of Warren Hastings, as to the competency of proving a national custom by a general history. The managers for the Commons wished to prove the customs in Hindostan, respecting the treatment of women of rank; and, for this purpose, proposed to read extracts from the History of the Growth and Decay of the Ottoman Empire, by Prince Demetrius Cantemir. (a) The counsel for the defendant objected, that it would be first necessary to lay some ground for the production of this evidence, at least, it should be shown, that the laws and customs of Constantinople were the same as those of Hindostan; and even then, they said, it might admit of considerable doubt, whether such a history could be admitted in evidence. After argument on the

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(a) Extract from a manuscript report of the proceedings, on the impeachment, in the possession of T. Jones Howell, Esq., the editor of the valuable new collection of State Trials, to whose kindness the author is indebted for the point above stated. The question occurred on the 22d of April, 1788. The point was referred to, by Lord Ellenborough, on the trial of General Picton. See 30 Howell's State Trials, p. 492.

part of the managers of the Commons, the House of Lords informed them, that if the passage, which it was proposed to produce from Cantemir's History, went to prove an universal custom of the Mahommedan religion, the managers might read it. The managers for the Commons, upon this, delivered in a book, entitled "The History of the Growth and Decay of the Ottoman Empire, written originally in Latin, by Demetrius Cantemir, late Prince of Moldavia; translated into English from the Author's Manuscript, by N. Tindal, &c." Two extracts from the book were then read.

*Vol. I. p. 453. l. 13., and Vol. II. p. 333. l. 3.*

The case of *Orr v. Morice*, in C. P. Mich. Term, 3 Brod. & Bing. 139., is an authority in support of the point here stated. In this case, which was an action for the use and occupation of premises, against the assignees of a bankrupt, the Court of Common Pleas held, that the deed of assignment of the bankrupt's effects, produced by the defendants, at the trial, under a notice from the plaintiff, was admissible in evidence without proof of the execution by the subscribing witness, as it appeared that one of the assignees had continued to occupy the premises for some time after the act of bankruptcy. The Court held, that, as the assignees claimed a beneficial interest under the deed produced by them, the plaintiff might use it in evidence, without proving its execution.

*Vol. I. p. 481. l. 22.*

The party, who brings an action on a mortgage-deed, given to secure an annuity, will not be obliged to prove that it has been duly enrolled: it is rather for the other party, who would avail himself of the want of the enrolment, to prove, that it has not been enrolled.

*Vol. I. p. 495, 496.*

The author is indebted to Mr. Alderson for the following note of the case of *Gurney v. Langlands*:

In the case of *Gurney v. Langlands*, an issue directed by the Court of King's Bench, for the purpose of trying the

genuineness of the signature on a warrant of attorney, which was tried at the last Summer assizes for the county of Herts, an inspector of franks was called, to prove that the signature in question was written in an imitated and not a genuine character. It appeared, that the witness had never seen any writing of the person, on whose signature he was called to give an opinion. The cases of *Revett v. Braham*, and *Rex v. Cator*, were cited in support of the evidence; but Mr. Baron Wood rejected the evidence. The Court of King's Bench, on a motion for a new trial, and cause shown against it, expressed doubts as to the admissibility of such evidence in general; but as this case was an issue, directed to satisfy the conscience of the Court, they discharged the rule for a new trial, on the ground, that the evidence, if admissible, was of no weight. The Lord Chief Justice Abbott remarked, "that such evidence was much too loose, to be the foundation of any judicial proceeding either by judges or jurymen."

*Vol. I. p. 499.*

In the case of a will, where one of the three attesting witnesses was the husband of a devisee, who took the remainder in fee after the death of the first devisee for life, and the question was, whether the will was duly executed to pass real estates, the Court of King's Bench have lately determined, that it was not duly executed. *Hatfield v. Thorp*, on a case directed by the Master of the Rolls, for the opinion of the Court of King's Bench. Manuscript note, supplied by the kindness of Mr. Barnewall.

*Vol. II. p. 81. n. (1).*

*Saunders v. Wakefield* is reported in 4 Barn. & Ald. 595. Add also *Jenkins v. Reynolds*, S. P. Trin. Term, 1821, 3 Brod. & Bing. 14.

*Vol. II. p. 255. n. (1).*

Add the case of *Winsor v. Pratt*, 2 Brod. & Bing. 650.

*Vol. II. p. 279. line 7.*

The case of *Francis v. Neave, Bart., Sheriff of Essex*, Trin. term, 1821, 3 Brod. & Bing. 26., is an authority in support

of the point here stated. In this case, which was an action for an escape, a person, belonging to the Sheriff's office, produced the writ from the office, stating that the writ came to the office from the plaintiff's agent, marked with the bailiff's name, and that he again indorsed the bailiff's name upon it. Mr. Baron Wood held, at the trial, this was sufficient proof, that the bailiff had acted by the Sheriff's authority; and the Court of Common Pleas were afterwards of the same opinion.

*Vol. II. p. 337. n. (\*)*

The provision in St. 46 G. 3., which made the striking a docket notice of a prior act of bankruptcy, is repealed by St. 49 G. 3. c. 121.; but this latter statute continued the provision in the former, as to the issuing of the commission, which is still to be deemed notice. See *Brooks v. Sowerby*, 8 Taunton, 165.

THE END.

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